Jaap Hage · Bram Akkermans *Editors*

Introduction to Law

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Preface

The *Introduction to Law* that you are now holding is special in the sense that it introduces students to law in general and not to the law of one specific jurisdiction. It has been written with two purposes in mind. In the first place, this book is meant to be used in the course Introduction to Law of the Maastricht European Law School. This course aims to provide law students with global knowledge of the basic legal concepts, elementary philosophy of law, and the main fields of law. Since the European Law School does not exclusively focus on the law of one particular European jurisdiction, there is need for an introductory course that also abstracts from the law of specific jurisdictions.

In the second place, and possibly more importantly, this book reflects a special way of looking at legal education. We believe that it is of crucial importance for lawyers to be aware of the different ways in which societal problems can be solved and to be able to argue about the advantages and disadvantages of different legal solutions. Being a lawyer involves, on this view, being able to reason like a lawyer, even more than having detailed knowledge of particular sets of rules.

The present *Introduction to Law* reflects this view by paying explicit attention to the functions of rules and to ways of reasoning about the relative qualities of alternative legal solutions. Where 'positive' law is discussed, the emphasis is on the legal questions that must be addressed by a field of law and on the different kinds of solutions that have been adopted by—for instance—the common law and the civil law tradition. The law of specific jurisdictions is mainly discussed by way of illustration of a possible answer to, for instance, the question when the existence of a valid contract is assumed.

The editors want to thank the authors who contributed to this book and whose names are mentioned in the headings of the chapters they wrote. Not mentioned in specific chapters but also important are the contributions of, in alphabetical order, Emanuel van Dongen, Amoury Groenen, Sascha Hardt, Philipp Kiiver, Dennis Patterson, Christian Pfeiffer, Dietmar von der Pfordten, Ralf Poscher, Mark Seitter, Anjum Shabbir, Jasmine Styles, André van der Walt, Antonia Waltermann, the anonymous reviewers who kindly commented on draft versions of the chapters, and the many students who commented on earlier versions of the texts. In different stages of the preparation and in different ways, all these persons assisted in making this book possible, and the editors express their gratitude for these contributions.

The editors of *Introduction to Law* are interested in your opinion of this book. We therefore invite you to send comments, suggestions, and questions to jaap.hage@maastrichtuniversity.nl.

Maastricht, The Netherlands — Jaap Hage
April 2014 — Bram Akkermans

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Foundations

1

Jaap Hage

1.1 What Is Law?

The main question that must be answered in any introduction to law deals with the nature of law. It does not seem to make much sense to write about law if it is not clear what law is.

Although the need for characterization of law's nature is obvious, it is a need that is not so easily satisfied. The law is multifaceted, and arguably it has been in flux over the years. In the current age of globalization and Europeanization, it is changing at high speed. It is therefore not possible to give a short definition of law from the outset. What is possible, however, is to mention a few characteristics of law. The majority of legal phenomena shares most of these characteristics, but not all legal phenomena share all of them.

1.1.1 Some Characteristics of Law

Rules A substantial part of law exists in the form of rules. These rules do not only specify how people should behave ("do not steal," "pay taxes"), but they also contain definitions of terms, create competences, and much more.

> An example of a rule that gives a definition can be found in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which defines "racial discrimination" as "... any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

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Article 37, Section 1 of the International Covenant on Civil and Political Rights provides an example of a rule that creates a competence for the Secretary-General of the United Nations. It states, in connection with the Human Rights Committee: "The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations."

Society is governed not only by legal rules but also by other types of rules. In the next section, we will have a closer look at law's most important relative—morality. But there are also other types of rules, such as the rules that belong to

- a religion (for instance, the Ten Commandments),
- etiquette (for example, "Eat with a knife and fork"), and
- special organizations such as student associations (for example, "Every member is to perform bar service twice a month").

Collective Enforcement One characteristic that distinguishes legal rules from other rules is that the former are normally enforced by collective means and in particular by organs of the state, while this is not true for the latter. Moreover, legal sanctions have very specific sanctions, such as incarceration, fines, compensation of damage, etc., while the sanctions of nonlegal rules are less specific.

For instance, someone who has committed a crime is liable to be punished, and this punishment is brought about by state organs such as the police and the prosecution service. From a moral point of view it is wrong to lie. And although liars may be liable to informal and private sanctions such as reproach and avoidance, they will seldom be sanctioned by collective means.
Later we will see, however, that collective enforcement becomes less useful to demarcate legal rules from other rules, because of the increasing importance of non-state rules which may also be categorized as law.

Positive Law Another characteristic that distinguishes law from other normative systems is that, by far, most legal rules are created by state agencies, such as parliaments, courts, and administrative bodies. As we will see, this has not always been the case, but at present most laws are explicitly created (or, in legal terms, "laid down"). A law that has been laid down is called *positive law*. The word "positive" in this connection is derived from the Latin *positus*, which literally means "laid down."

The idea that law is explicitly created has gained such a strong sense of obviousness that the expression "positive law" has almost become synonymous with "the law that is valid here and now". The increasing importance of non-state rules, however, is a reason to question this obviousness.

Moreover, legal rules can also be repealed, which is not possible in case of, for example, moral rules.

1.1.2 Law and Morality

Legal rules are often compared to and contrasted with moral rules. One reason why this happens is because we consider it desirable that the law does not violate morality. Conformity of the law with morality is, in the eyes of some (adherents of "natural law"; see Chap. 14), a precondition for the existence of law: a rule that clearly violates morality would not be a binding legal rule at all.

Another reason is that governments see it as their task to enforce the law but not to enforce morality. Therefore, it is important that legal rules can clearly be identified as such and distinguished from rules that are "merely" moral.

1.1.2.1 Differences Between Law and Morality

Degrees vs. Binary The law has as one of its main functions to guide behavior, by telling people what to do or not to do in the form of prohibiting and prescribing acts. However, most of morality is *not* concerned with guidelines for behavior: it does not directly tell us what we should do or should not do. Morality primarily sets standards through which we can evaluate behavior as "good," "not so good," or simply "bad." Good and bad come in degrees: better or worse. From the legal point of view, a particular act is either permitted or not, without such grey areas.

> However, there are moral rules that do prescribe behavior. Take for example the "Thou shalt not kill" of the Ten Commandments.

Moral Standards Important A second difference is that moral norms and standards are normally considered to be important for the well-functioning of society, while this is not necessarily the case for all legal rules.

> For instance, typical moral rules forbid lies, and wounding or killing other persons. Lying, wounding and killing are serious issues, and so there are moral guidelines that deal with them.
> These moral rules have equivalents in legal rules, which therefore also deal with important issues. However, there are many legal rules that deal with issues that are not broadly experienced as "serious," such as the amount of salt allowed in food, the precise form in which requests to government agencies must be made, or the way in which bicycles must be equipped with lighting.

State Enforcement A third difference between law and morality is that being legal is a precondition for rules that are to be enforced by state organs; moral precepts as such are not enforced in that way. However, many moral rules and standards have counterparts in the law so that state enforcement of morality is possible in the form of state enforcement of the law.

> Examples include:
> 1. the moral prohibition to kill people, enforced under criminal law, which imposes a penalty for "murder" and "manslaughter" (legal terms), and
> 2. the prohibition to destroy someone else's property, enforced through tort law rules, which attach an obligation to compensate the damage caused by the destruction.

1.1.2.2 Positive and Critical Morality

Positive Morality When looking at the relationship between law and morality, it is useful to keep in mind that the very notion of "morality" is ambiguous. On one hand, it may relate to positive morality, the moral standards and precepts that are broadly accepted at a particular time and place. Such "positive morality" at a certain time or place may differ from positive morality at another time or place.

> It may be the case that in the West all persons are to be treated equally, while in the East elderly people gain certain advantages because they are culturally considered to deserve more respect. Another example would be that views about the moral and societal acceptability of homosexual behavior have changed over the course of time.

Critical Morality On the other hand, "morality" may stand for *critical morality*, the moral rules and standards that should rationally be accepted regardless of what positive morality says. In general, these rules and standards will not fully coincide with those of positive morality.

> Suppose that in a particular society the use of drugs is considered as morally bad, no matter what the consequences. But this same society has no moral problem with the use of alcohol, if this use does not lead to misbehavior. One might wonder whether these moral attitudes are consistent. Why shouldn't the use of alcohol also be considered as unconditionally bad? Or, why is the use of drugs not considered as bad only if it leads to misbehavior? If one asks such questions, one engages in critical morality, and if one concludes that the use of alcohol is "really" as bad as the use of other drugs, one has arrived at a conclusion of critical morality.

Very often, when people ask whether something is good or bad, they mean whether it satisfies the standards that should rationally be accepted. Whereas it is in general easy to establish what the standards of positive morality require, it is often a matter of dispute what is required by critical morality.

> Take the example of giving to the poor. According to positive morality this is probably seen as a good thing, but not required, and not as a moral duty. One way this can be established is by interviewing a sufficient number of people.
>
> However, it is not so easy to determine whether there is a moral duty in the sense of critical morality to give money to the poor. In fact there are substantive differences in opinion. Libertarians believe that people are free to do whatever they deem fit with their money and belongings, as long as they do not violate the rights of others. Utilitarians, on the contrary, believe that, morally speaking, people should do what maximizes the total amount of happiness. If giving to the poor increases happiness (the gain in happiness of the poor outweighs the loss of the rich), then according to utilitarians, there is a moral duty for the rich to help the poor.

1.1.2.3 Legal Certainty

It is often quite easy to establish the contents of positive law. The rules only need to be looked up in legislation or in judicial decisions. This may take some time, but in the end it is often possible to establish the contents of the law beyond reasonable doubt: positive law offers *legal certainty*. As a consequence, it is usually unnecessary to invoke an authority, such as a judge, to untie the knot in a legal dispute. The

parties to such a dispute can predict what the judge's decision will be, and that saves the parties, and society at large, time and money.

> The fact that it is often easy to establish the contents of positive law can be obscured by the phenomenon that legal scholars tend to focus on "hard cases", in which the "correct" legal solution is disputed.

Disagreement If the issue at stake is not what the positive law is but what is "really" right, it may be much harder to reach an agreement. Although people frequently agree about what is right or wrong in the sense of critical morality, they also often disagree. This is less attractive as a basis for a smooth functioning society than the certainty of positive law. Often it is better to have no conflicts or fast solutions for conflicts than to have a laboriously reached "right" solution. Therefore, the law often prefers the certainty of a clear result over the uncertainty of the "best" solution for a problem.

Positive law also offers legal certainty in a different manner, namely by providing collective support for the *enforcement* of legal duties.

A third aspect of legal certainty is that similar cases are treated in a similar fashion or—in other words—that the law will be applied consistently.

> For instance, if one citizen is granted a building permit, legal certainty requires that another citizen who is in exactly the same position (and applied for one) should also be granted a building permit.

So legal certainty has at least three aspects:

1. certainty about the content of the law,
2. certainty that the law will be enforced,
3. certainty that the law will be applied consistently.

1.2 Roman Law

Our present day law did not fall out of the blue sky. It is the outcome of a historical development in which what are called "sources of law" play an important role. As the easiest way to obtain an understanding of legal sources is through history, we will sketch the development of the law in Europe. In this connection, Roman law and common law play a central role.

Historical descriptions of the development of law in Europe often start with the impressive legal system built by the Romans in the period ranging from the eighth century BC (Before Christ) until the sixth century AD (*Anno Domini* or After Christ). Impressive as the Roman system may have become in the course of these centuries, it started out in a simple form, that of tribal customary law.

1.2.1 Tribal Customary Law

Nowadays we are very much accustomed to law as the law of a particular country, such as German law or English law. More recently, we have seen the emergence of European law as concurrent with national law in the countries that make up the European Union. And, of course, there has existed for a number of centuries a body of law that governs the relations between states. This body is called *international law*.

The law of the Romans, however, was not the law of a country or a state but the law of a *people*, namely the Roman people. Since they were comprised of a tribal group whose members were connected mostly by family ties, the early law of the Romans was *tribal law*.

> If a people grows larger, the main ties between its members can no longer be family ties, or at least not close family ties. The binding factor will then be a shared culture, for instance based on a common religion or language. We call such a people with a shared culture a *nation*. Nations are discussed in Sect. 8.1.3.

Customary Law As with most tribal laws, early Roman law was customary law. Customary law consists of guidelines for behavior that have grown spontaneously in a society, such as a tribe, in the form of mutual expectations, which after some time are accepted as binding.

> An example would be that the head of the tribe gets the first pick if an animal was caught on a hunt. For the first few times this may be merely a kind gesture by the hunters towards the tribal leader. But if it is repeated over a period of time everyone will count on its reoccurrence, and there will be reproaches if the chief does not get the first pick. In the end, the reproaches may become so serious that the hunters will be punished if they do not offer the chief the first pick.

Historical Legislator These guidelines are transmitted from generation to generation and are considered to be "natural" and rational, and their origin is frequently attributed to a historical, often divine, legislator.

> An example would be the Ten Commandments and other rules which were, according to the Torah, given to the Jewish people by God on Mount Sinai, through the intermediary of Moses.

Immutability This ascription to a historical legislator explains another characteristic of customary law, namely that it is taken to be immutable. The law has been such and such since time immemorial and will never change. However, as customary law starts as unwritten law, there may be gradual changes that go unnoticed because there are no texts that facilitate the comparison of recent law with that of older generations. As a consequence, customary law may change slowly over the course of time, adapting itself to circumstances, while its image of natural and immutable law may remain intact.

Although customary law is often retrospectively ascribed to a legislator, it is typically *not* the result of legislation. It consists of rules that are actually used in a society to govern the relations between the members of this society and are usually

not easily distinguishable from religious and moral precepts. It is only at a later stage of development of a legal system that the distinction between legal, moral, and religious precepts can be made.

> Arguably, such a sharp distinction presupposes a separation between church and state, a separation which has gradually grown in the Western world since the late Middle Ages. But note that this separation has not been accepted in a number of non-Western countries, particularly those that aim to follow Islamic law.

Ius Civile and Ius Gentium The tribal nature of classical Roman law is reflected in the fact that the Romans used different laws for mutual relations between members of the tribe (*ius civile*) and relations between tribe members and foreigners or between foreigners among each other (*ius gentium*).

> For instance, *ius civile* would govern a conflict between two Roman citizens about the use of a piece of land, while the same conflict would be governed by *ius gentium* if one or two foreigners were involved.
> The distinction between *ius civile* and *ius gentium* only became important in what is called the "classical period" of Roman law, from the 3rd century BC onwards. Although the *ius civile* was originally meant for use within the tribe, its scope of application was gradually broadened to include all Roman citizens, a group which grew larger and larger in the course of years.

1.2.2 Codification

Customary law starts as unwritten law, but this does not preclude that it is written down at some stage. The Roman *ius civile*, for instance, was written down in 451 BC on what is called the *Twelve Tables*. The reason was that, if there was any doubt, customary law could be interpreted by the *pontiffs*, officials who came from the cast of *patricians*, the societal upper class. The *plebeians*, the lower social class, objected to this practice because they feared that the pontiffs might use their power to interpret the law to the advantage of the patricians. If customary law were written down and published, its contents could be inspected by anyone who could read.

> This is another example of why the certainty of law is important: it makes it more difficult for rules which govern society to be manipulated to the advantage of a few.

If customary law is written down, the law is described as having been *codified*. All codified laws are written law and in this sense resemble law that was created by means of legislation. Still, there is a difference: law that was codified already existed before the codification, while law that was created through legislation did not exist before it was written down.

1.2.3 Praetor and Iudex

If two parties have a dispute about a particular case, the legal solution will depend on two factors: the facts of the case and the contents of the law. In Roman law, these two factors were linked with two roles in a legal procedure, namely the role of the *praetor* and the role of the *iudex* (judge).

The function of *praetor* was only instituted in 366 BC.

Jurists If one party wanted to sue another, he had to go to the *praetor* and explain his case. If the *praetor* was of the opinion that the case might be successful, he would formulate a kind of instruction (the *formula*) to the *iudex*, in which this judge would be told to grant the suing party a legal remedy if certain factual conditions had been fulfilled. It was then up to the judge to determine what the facts of the case actually were and whether these facts, in light of the formula provided by the *praetor*, justified the remedy. This division of roles made the *praetor* responsible for establishing the precise content of the law and the *iudex* for the determination of the case facts. Because the role of the *iudex* did not require special legal knowledge, it could be fulfilled (and actually was fulfilled) by laymen.

In modern times we find a role similar to that of the *iudex* in juries, consisting of laymen who must decide about the facts of the case. In criminal cases the finding of the juries will be "guilty" or "not guilty". If the function of the *iudex* is fulfilled by a jury, the function of the judge will resemble that of the *praetor*.

Because the *praetor* had the task of interpreting the law, he had a considerable influence on the content of the law. However, the function of the praetor was first and foremost a political one, a stepping stone on the way to become a *consul*. The praetor was therefore not necessarily a trained lawyer. Possibly to remedy this deficiency, the praetor was advised by jurists, who also advised process parties. As a consequence, jurists had, through their advice, a great degree of influence on the development of the law.

1.2.4 The Corpus Iuris Civilis

In the year 395 AD, the Roman Empire, which had come to encompass large parts of Europe, Northern Africa, and parts of the Middle East, was split into a Western and an Eastern part. Not long thereafter, the Western Empire succumbed under an invasion of Germanic tribes, and Rome fell and was plundered by the Germanic tribes in 455 AD.

The Eastern Empire continued to exist until the fall of its capital, Constantinople (now Istanbul), in 1453 in a war against the Turkish Ottoman Empire. But long before that, the Eastern Empire reached a cultural summit with the *Corpus Iuris Civilis*. This *Corpus* was an attempt to codify the existing Roman law. It was published on the order of Emperor Justinianus in the period from 529 to 534 AD and consisted of several parts. One part was the *Codex*, which contained imperial

legislation of several centuries. Another part consisted of the *Digest*, a collection of excerpts from writings of jurists from the period of about 100 BC until 300 AD. The *Institutions*, a student textbook, formed the third part.

1.3 Common Law

After the fall of the Western Roman Empire, the law of Western Europe to a large extent returned to customary tribal law, this time to the law of the Germanic tribes that had taken possession of the area.

> Some remnants of Roman law remained in force for former Roman subjects, side by side with the customary law of the tribes, but these formed only a shadow of the complex legal system that the Romans had built.

In the High Middle Ages (the eleventh century until the fifteenth century), several developments took place that had an enduring influence on the development of law in Europe. One of them was the rediscovery of Roman law, starting from the eleventh century. The subsequent "reception" of the Roman law turned out to be very influential on the development of private law on the European continent.

In England, Roman law had much less influence, and that had to do with a second important development, namely the rise of common law.

1.3.1 Royal Justices

The start of the development of common law as a separate legal system dates back to 1066 AD, when the Norman King William I (the Conqueror) invaded and conquered England. This initiated a movement towards unification of the English legal system, which until then mostly consisted of local customary law.

The unification was brought about by means of a system of royal representatives who traveled through the country to administer the law. These "royal justices" applied the same law, and this law was to become the *Common Law of England*. Another factor that contributed to the creation of the common law was the thirteenth century emergence of central courts of justice. The existence of central courts facilitated uniform application of the law all over the country.

> For law to be uniform, it is not only essential that the rules are the same everywhere, but also that these rules are applied in the same way. The law consists as much of its rules as of their mode of application.

The fact that England already had a uniform legal system is one of the reasons that the rediscovery of Roman law, which had a tremendous influence on the development of continental European law, did not affect English law to a large extent. As a consequence, the English legal system and the legal systems of the continent developed more or less independently of each other. One of the most conspicuous differences that resulted from this separate development is that

continental legal reasoning focuses on the creation and the application of rules, mostly statutory rules, while the emphasis in the common law tradition has been on reasoning by analogy to previous cases. This is a consequence of the doctrine of *stare decisis*, to which we will now turn.

1.3.2 Precedent

Customary law comes into being if particular guidelines and standards for behavior are traditionally used in a particular society and are experienced as binding.

> If a regular form of behavior is not experienced as binding, for instance to go to the movies on Saturday evenings, then it is no more than a mere *habit*; it is not customary *law*.

Customary rules are used by, among others, judges and other legal decision makers.

> As we will see in Chap. 2, it is usual to distinguish judge-made case law from customary law as a "source of law". One of the points of this section is that this distinction is not always very sharp. The customary nature of customary law consists partly in the fact that legal decision-makers follow the custom of applying these rules.

Customary rules can come into being, or are confirmed, if they are actually used in legal decision making.

> An example would be the following: A peasant sells a cow to another peasant. The cow turns out to be sick and dies within a few weeks. The second peasant wants his money back. The seller refuses to return the money and says that the buyer should have paid more attention to his purchase. If he had done so, he might have known that the cow was sick. The case comes before a judge, who agrees with the seller: the buyer should have been more careful, since the illness of the cow would have been detected had there been a careful inspection of the animal.
> In future cases, there is no longer a need to go to a judge about the sale of an unhealthy animal if the animal's bad condition might have been discovered through careful inspection. In such cases no money will be returned from the seller to the buyer. The decision of the judge will function as a *precedent* for future cases. Moreover, after some time, the rule that discoverable illness of cows does not constitute a reason to request the return of the sale price will be considered as customary law.

Judicial decisions can and often will function as precedents. There are two ways to interpret this. The first interpretation is that the decision of the judge is *evidence* of the law that already existed before the judge gave his decision. If the rule already existed, it is clear that the same rule should be applied in future cases and also by other judges.

A second interpretation is that the judge, in giving his decision, created a new rule that did not yet exist but would exist from the moment that the decision was given. It is also understandable in this interpretation that other judges will have to apply the rule in future cases. It is this second interpretation, namely that courts' decisions *create* the law rather than merely state it, that has become prevalent in the twentieth century.

> In earlier centuries, the view that judicial decisions were merely evidence of pre-existing law was the fashionable one. Blackstone, a famous English lawyer from the 18th century, wrote that: "[. . .] the decisions of courts of justice are the *evidence* of what is common law". (Emphasis added.)

Stare Decisis The second interpretation is confirmed in the doctrine of *stare decisis* (Latin for "stand by your decisions"). According to this doctrine, if a court has decided a case in a particular way, then the same court and the courts that are inferior to it must give the same decision in future cases that are similar.

> In 1966 the highest English court, the House of Lords (since 2009: the Supreme Court, and to be distinguished from the political "House of Lords"), announced that it would not consider itself bound by its own previous decisions anymore. By this announcement it created for itself an exception to the *stare decisis* rule.

Case-Based Reasoning The custom to decide cases by analogy to previous cases and the doctrine of *stare decisis* together mean that common law has developed on the basis of precedents and case law. English legal reasoning has therefore become a form of case-based reasoning, looking for similarities and differences between new cases and old cases that have already been decided. Although legislation also plays a role in English law, the emphasis has traditionally been on common law, which consists of a large body of cases. It may be argued, however, that this focus on cases instead of legislation has lost some of its importance now that the United Kingdom has become a member of the European Union and the laws of the European Member States are converging.

Common Law Tradition The English legal tradition has been exported to the members of the British Commonwealth. As a consequence, it is not only England that is a common law country but also Ireland, Wales, most states of the USA, Canada, Australia, and other countries. The common law of all these countries has its basis in old precedents, stemming from the time that these countries were part of the British Empire, but has grown apart since these countries became independent. Still, the precedents in the different common law countries play some role in other countries of the common law tradition. In this sense, common law is a major legal tradition, standing side by side with the civil law tradition that stems from continental Europe.

1.3.3 Equity

This picture of the common law tradition would be one-sided if it did not pay some attention to the phenomenon of *equity*. Just like common law and legislation, equity forms part of the law in common law countries. And just like common law, equity is a kind of judge-made law. There are some differences, however.

Equity originated in the fourteenth century AD in England, when persons who were unhappy about the outcome of common law procedures petitioned the King to intervene on their behalf. If the outcome of the common law for a particular case

was found to be very inequitable, the King, or rather his secretariat, the *Chancery*, might ask the common law courts to reconsider the case. Later, the Chancery began to deal with such cases itself, and petitions came to be directed immediately to the Chancellor (the King's secretary) rather than to the King. A subsequent Court of Chancery eventually developed over centuries, creating a separate branch of law: equity.

Fairness Equity consists of a body of rules and principles that were developed to mitigate harsh results that might, in some cases, result from the application of common law. As the term "equity" suggests, this part of the law is particularly focused on obtaining fair results. Originally, equity may have been intended to be a correction to common law, where common law remained the starting point when the decision of cases is at stake. However, some branches of law were only developed in equity, the *law of trusts* being the most prominent example.

> The following example illustrates how equity differs from the common law. Angela is an unmarried woman of means who has a two-year old son Michael. Angela wants to give £50.000 to Michael, for the unexpected case that she might die. However, Michael is too young to deal with so much money. Therefore, Angela trusts the money to her friend Jane, who will act as a safe keeper for Michaels' money. Under the regime of the common law Jane would be the only owner of the money and it would depend on her benevolence whether she keeps the money for Michael. Michael would have no legal remedy if Jane abused her position. That is unfair, since the money was meant for Michael and Angela was only trusted with it to keep it for Michael.
>
> In equity it is possible to provide Michael with a more robust legal position. Angela will be the legal owner of the money (at common law), but acts as a "trustee". Michael will be the "beneficiary owner" (owner in equity) of the same money, and has a legal remedy against Angela if she does not keep the money for him.

Although nowadays it may be correct to state that equity is part of the law in the common law tradition, originally it was meant as an exception to the law, and therefore not as part of the law. This difference is still reflected in English terminology, where the distinction is made between what holds *at law* (the common law) and *in equity*.

The historic roots of equity, namely that equity was applied by the Court of Chancery as a correction to what would be decided by "ordinary" common law courts, explain that equity was originally applied by separate courts. A number of reforms of the court structure in England in the nineteenth and twentieth centuries mean, however, that a single court can apply both common law and equitable principles to resolve disputes.

> It is a matter of on-going debate whether this fusion of courts has also led to a fusion of the common law and equity, or that—as metaphor will have it—"the two streams of jurisdiction, though they run in the same channel, run side by side and do not mix their waters".

1.4 Ius Commune

For most of the Middle Ages (roughly fifth to fifteenth centuries AD), Western Europe was divided into a variety of smaller or larger territories, inhabited by different peoples. These territories had their own local customary law, and as a consequence the law in Europe was diverse. As far as legal science was concerned, this situation gradually changed after the rediscovery in Northern Italy of the *Digest*, at the end of the eleventh century. The Digest became an object of study at the newly founded University of Bologna.

> Important names in this connection are those of the law professors Irnerius and Accursius, and Bartolus and Baldus in the eleventh to fourteenth centuries.

Canon Law Not only had the Digest become the object of a renewed scientific study of the law but also Canon law, the law of the Roman Catholic Church. Canon law dealt with the internal organization of the church and also civil affairs such as marriage, contracts, and wills.

> There were a lot of diverse texts which discussed this canon law and they were not always consistent. In 1140, the *Decretum Gratiani* was compiled: a collection of existing texts that were relevant for the Canon law. This document was also an attempt to make the diverse texts consistent.

Roman law and Canon law were usually studied together.

> This is still reflected in the titles "Bachelor of Laws" and "Master of Laws" (plural). In the abbreviation "LLM", which stands for "Master of Laws" the two L's represent these two branches of law.

The law schools in an increasing number of universities (such as Bologna and Orléans) became quite popular and attracted students from all over Europe. When the students returned home, they took knowledge of Roman and Canon laws with them. In this way, the same body of legal knowledge was spread over Europe.

At first, the practical relevance of this European "common law," which is known under the Latin name *ius commune*, was not very large because local customary law still had the lead. Gradually, though, the *ius commune* became more influential, especially where local customary law was found to be inadequate.

> Customary law could be found inadequate either because of its less sophisticated contents, or because it was hard to access since, as it was customary law, it was not written down.

Reception This process, in which Roman law in a sense "conquered" legal science in Europe and which took place from the twelfth until the seventeenth centuries, has become known as the "Reception" of Roman law. One of the reasons why Roman law gained acceptance is that it was considered to be rational, meaning that well-informed people would see that it contained good, if not the best possible, rules.

> Roman law was seen as *ratio scripta*, "reason written down".

Being rational has always been one of the modes of existence of the law: rules were considered to be legal rules because they were rational. We can find this in the

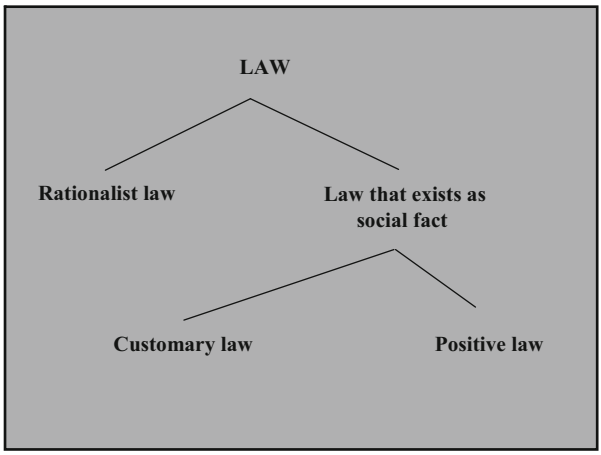

Fig. 1.1 Kinds of law

definition of law, which was already given in the thirteenth century by the Christian theologian and philosopher Thomas Aquinas.

> According to this definition, the law is "a *rational* ordering of things which concern the common good, promulgated by whoever is charged with the care of the community". This definition was, by the way, not intended as a characterization of Roman law.

Natural Law During the seventeenth and eighteenth centuries, there was a strong movement among learned legal writers that emphasized the rational nature of the law, and some authors attempted to establish the content of law purely by means of reasoning. Law that was established by means of reason was usually discussed under the heading of natural law.

> Hugo Grotius (1583–1645), developed in his book *De iure belli ac pacis* (On the Law of War and Peace) the outlines of international law and private law on a rational basis.
> Samuel von Pufendorf (1632–1694) developed in his book *De officio hominis et civis juxta legem naturalem libri duo* (On The Duty of Man and Citizen According to the Natural Law) large parts of private law, also on the basis of reasoning alone.
> A similar enterprise was undertaken by Christian Wolff (1679–1754) in his *Jus naturae methodo scientifica pertractatum* (Natural Law Dealt With by the Method of Science).

Rationalist law, along these lines, can be opposed to two forms of law that exist as a matter of social fact, namely customary law and positive law in the sense of law that was laid down (see Fig. 1.1).

1.5 National States and Codification

Peace of Westphalia England was already, to a certain degree, united during the eleventh century, but on the European continent the process of unification, in which

small territorial units combined into bigger ones, the modern countries, lasted longer. Although the unification of Italy and of Germany took place only during the nineteenth century, it is often assumed that the process of state formation on the continent reached a provisional end point in 1648 when a number of wars were ended by the peace treaties of Westphalia. In these treaties, Europe was divided into a number of nation states (states corresponding to a nation), which were assumed to be sovereign, meaning that each state would have exclusive power over its own territory.

National Law One of the consequences of this development was that law was to become primarily national law. Originally, the law was the law of a people or tribe rather than of a territory. Later, when the different peoples that had flooded Europe in the period of mass migrations (fourth to sixth centuries AD) had settled down and began to mix, the law became local law, attached to territories of varying sizes. Only when the national states had formed could the law become the law of a nation state.

Westphalian Duo Alongside this national law, there was law that dealt with mutual relations between the national states. This law is called *International Public Law* (see Chap. 11). National state law and international public law were taken to exhaust the forms that the law could take. These two became known as the "Westphalian duo." See Fig. 1.2.

With the arrival of national states, the law could become national law, but it still took several centuries before this process of nationalization of the law was finished. A major step was taken with the French Revolution (1789–1799), in which the line of French kings was replaced, first by revolutionary agents and later by an emperor, Napoleon Bonaparte. It was Napoleon's reign that led to the codification of French law.

1.5.1 Codification

Shortly after the French Revolution, French law was codified in the form of a number of "Codes."

> They included the *Code civil* (private law), the *Code de commerce* (commerce law), the *Code de procédure civile* (law of civil procedure), the *Code pénal* (substantive criminal law), and the *Code d'instruction criminelle* (procedural criminal law).

This codification, like others, served several purposes:

- It brought about legal unity in France, where until then (part of) the law had differed from region to region.
- It created legal certainty because the law was written down and could, at least in theory, be inspected by everyone.

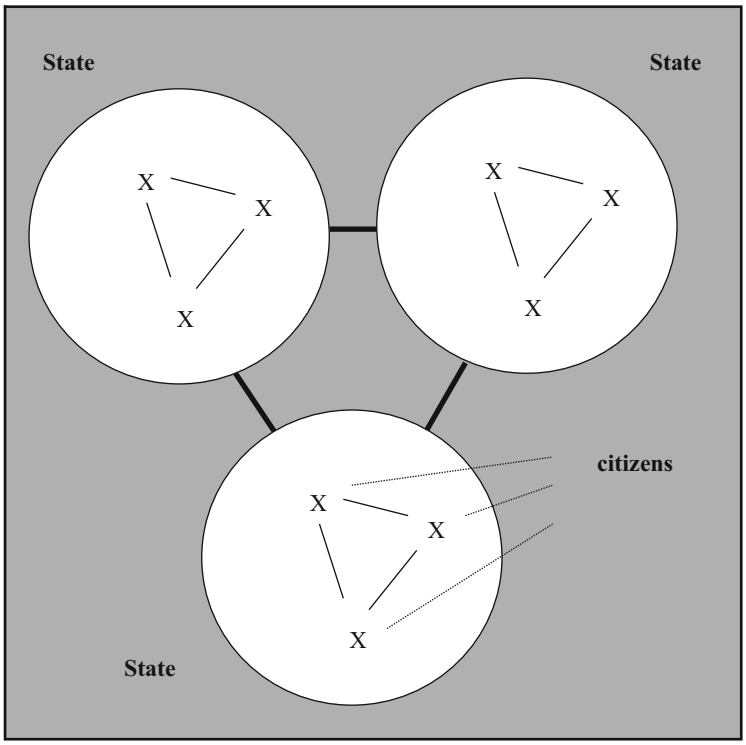

Fig. 1.2 The Westphalian duo

- It emphasized the legal power of the central lawmaking agencies as opposed to the local judges.
- It guaranteed the influence of the people on the contents of the law because democratic organs have influence on the legislative process. (This last purpose only became relevant later, when democracy became more important.)

Partly under the influence of the Napoleonic conquest of large parts of Europe, codifications were introduced at the beginning of the nineteenth century in several European countries, including Belgium and the Netherlands.

Germany notably lagged behind because a strong resistance movement rose against codification.

> This is all the more remarkable since some codifications in Germanic countries such as Bavaria and Prussia preceded the French codification. Codification for the full German empire was (temporarily) postponed.

Historical School Under the leadership of Von Savigny (1779–1861), a famous law professor in Berlin, it was argued that the law of a nation reflected the "spirit" of that nation (the "*Volksgeist*"). Codification would fossilize the law, and the crucial

connection between the law and the spirit of the people would be lost. Therefore, codification should be preceded by historical research on the origins of law and the reasons behind the law, hence the name of this movement of which Von Savigny was one of the most important representatives, the Historical School.

In practice, this alleged relationship between the spirit of the people and the developing law was maintained by legal scholars, who wrote comments on the *Digest* and, in doing so, gradually adapted the law to the needs of society. Development of the law in Germany was, as a consequence, driven by legal scholars.

> At the end of the nineteenth century, the resistance against codification lost its battle against the codification movement. In 1900 a codified German civil code, the *Bürgerliches Gesetzbuch*, entered into force.

1.5.2 Interpretation

Where the common law tradition takes cases as its starting point, the civil law tradition that is dominant in the European continent focuses on reasoning on the basis of rules. To allow legal decision makers to reach desirable results by means of these rules, so-called canons of interpretation were developed through which the results of the rules could be adapted to the needs of concrete cases.

The Literal Rule or Grammatical Interpretation It is sometimes necessary to decide about the proper scope of application of a rule. For instance, does a rule that forbids the presence of dogs in a butchery also apply to guide dogs? If an issue arises about a guide dog in a butchery, it is necessary to take a decision whether guide dogs are dogs in the sense of the regulation, and this decision should be motivated.

One kind of reason to motivate the interpretation of a rule is that the interpretation matches the literal meaning of the words in the rule. Guide dogs are dogs, aren't they? Therefore, a rule about dogs also applies to guide dogs. The canon of interpretation that states that rules should be interpreted literally is called the "Literal Rule," and the resulting interpretation is called "grammatical" or "literal interpretation."

The Mischief Rule or Legislative Intent Often, written rules are created to solve some problems. The legislator meant to achieve particular results, and the rule was seen as a means to obtain these results. If a legal decision maker gives the rule an interpretation that makes it suit the intention of the legislator, he is said to apply the Mischief Rule.

> Suppose that the legislator created the prohibition of dogs in butcheries in order to prevent unhygienic situations in food stores. He considered the case of guide dogs but nevertheless decided not to make an exception, because hygiene was considered to be very important. If a legal decision maker wants to follow legislative intent, he must interpret the rule to make it also apply to guide dogs.

The Golden Rule; Purposive or Teleological Interpretation When an interpreter looks at the purpose of a rule, he may revert to the intention of the legislator who formulated the rule. That is the application of the Mischief Rule. However, he may also try to determine the purpose of the rule himself. When we speak of purposive or teleological interpretation, the decision maker applies the so-called Golden Rule.

> Assume again that the legislator created the prohibition of dogs in butcheries in order to prevent unhygienic situations in food stores. If a legal decision maker recognizes this interest, but finds the interest of visually handicapped persons more important, she might interpret the rule to make guide dogs fall outside the rule's scope.

The Lawyer's Toolbox We have seen that a legal decision maker who must justify his choice for a particular rule formulation has the choice from different techniques. Some of these techniques are relatively formalist: the decision maker refers to the decision of someone else, a legislator, or a court, and avoids to give a value judgment himself. Other techniques are more substantive: the decision maker engages into reasoning about what would be a good rule. He makes his own value judgment and bases his interpretation of the rule on this value judgment. In both cases, however, the decision maker has to choose a technique.

The different legal sources, the reasoning techniques, and the canons of interpretation can be compared to a set of decision-making tools in a lawyer's toolbox. Depending on the needs of the case, a legal decision maker picks a tool that helps him to reach a desirable result. In this connection, he has a certain leeway.

1.6 Legal Families

Common Law Family The developments in the law in Europe during the second millennium divided the national legal systems in Europe, by and large, into two "legal families." On one hand, there is the common law family, which includes England, Wales, and Ireland.

> Scottish law was influenced by both the common law and the civil law tradition. It is a "mixed legal system".

These systems were not so influenced by the reception of Roman law. Moreover, the development of common law is driven by the judiciary because the judges make new law through their decisions.

> It must be said, though, that recently legislation has become a more important source of the law in the common law countries too.

Civil Law Family The great counterpart of the common law family in Europe is the civil law family. The law of most countries in the European continent has been greatly influenced by the combination of Roman and Canon laws.

It is possible to detect a further subdivision within this civil law tradition. On one hand, there are countries that have been strongly influenced by the French codification movement. This movement emphasized the role of parliament and democratic

input in making the codification. The creation of law is, from this viewpoint, firstly a political process. Countries that belong to this *French family* include France, Belgium, Spain, and Portugal.

On the other hand, there are countries that belong to the *German family*, in which the development of law was much more driven by legal scholars. Countries that belong to this tradition include Germany, Austria, and Switzerland.

> The Nordic countries do not fall neatly in this twofold division, and many European countries, including Italy, the Netherlands and Poland, have been influenced by both the French and the German tradition.

1.7 From National to Transnational Laws

The period of codification initiated a development towards the use of more and more positive law. The nineteenth century codifications still largely reflected preexisting law. However, during the twentieth century, and especially after World War II, legislation was increasingly used to create new law. This development took place both in the European continent and in Great Britain. In particular, the large increase in the amount of administrative law, which regulates relations between a government and its citizens, caused a growth in the amount of law in general, and this law was mostly positive, state-made, national law.

After World War II, several other developments took place too, developments that meant that the *Westphalian duo* had to give up its claim to exhaust the kinds of law, even in the Western world. These developments include (but this is not an exhaustive list):

- the rise of human rights,
- the creation and development of the European Union, and
- the revival of the *Lex Mercatoria*.

1.7.1 Human Rights

Traditionally, human rights were conceived as rights of individuals against their governments.

> Human rights are covered extensively in Chap. 12.

Human rights were part of the national law of states and were safeguarded in national constitutions. Ironically, the responsibility of national states to protect human rights is meant to protect citizens against the national states themselves! The scope of these human rights was determined by national judges, who had to decide in particular cases on whether a state had violated a human right.

After World War II, human rights came to be protected under treaties. Some of the most important ones have been created under the aegis of the United Nations.

Examples of treaties with a world-wide scope are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both 1966). The Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948, is very important. It is not a treaty properly speaking, as it was not created by an agreement between states. In Europe, the European Convention on Human Rights (1953) has also been an influential source of human rights.

Because human rights were proclaimed and protected by international treaties, they no longer belonged exclusively to the domain of national law. Although states can theoretically withdraw from treaties, in practice this is often not a viable option. States that have committed themselves to the protection of human rights have undertaken commitments towards their citizens who are, to a large extent, outside their control. This phenomenon is even enforced if the application and interpretation of the treaties are assigned to judicial bodies that are beyond the power of national states.

An example of such a body is the *European Court of Human Rights*, which can deliver rulings that interpret the application of the European Convention on Human Rights, and this is binding on states.

So while states can still determine to which human rights they bind themselves by means of treaties, the scope of these rights is often determined by independent courts. In this way, states have lost control over part of the law that is binding on their territories and which also binds them.

Ius Cogens This loss of control goes even further when it is assumed that states can also be bound by human rights to which they did not consent in the first place. This is the case if human rights are part of what is known as the *ius cogens*, a set of peremptory norms of international law that are accepted and recognized by the international community of states as norms from which no derogation is permitted. Prohibitions on torture and genocide and fundamental rules of humanitarian law have been recognized as human rights that are described as *ius cogens*.

A norm is said to be *peremptory* if it is binding and cannot be set aside by another norm. This means that peremptory norms prevail if there is a conflict of norms.

As these examples illustrate, the field of human rights has freed itself, to some extent, from the control of national states and states are, in modern times, bound by legal norms that they cannot control.

1.7.2 European Union Law

In the treaties that created the European Union (EU), the institutions of the European Union have been given powers to make new European legal rules. In two famous decisions (*Van Gend & Loos* and *Costa/ENEL*), the Court of Justice of the European Union decided that these European legal rules belong to a separate and autonomous legal system.

More about these two famous cases in Sect. 10.6.4.

The rules that stem from the EU do not only bind the Member States but also their legal subjects. Moreover, these European legal rules have precedence over the states' domestic legal rules. As a consequence, the Member States of the EU and their legal subjects are bound by a legal system that is neither the system of a nation state nor a system that regulates the mutual relations between nation states. In other words, the existence of EU law does not fit in the Westphalian picture that takes national states as its starting point.

1.7.3 Lex Mercatoria

The *Lex Mercatoria* is a set of rules created by merchants to regulate their mutual dealings. In principle, commercial relations are governed by the rules of private law, the law that deals with mutual relations between private actors. However, the existing rules of private law were not always found suitable for the peculiar needs of trade relations, and therefore as early as in the Middle Ages, a separate and independent body of rules emerged. For the same reason, separate courts originated, which had more expertise in commercial matters and which operated more swiftly.

Nowadays, there still exists a body of rules that govern international commercial relations. This body consists of treaties, such as the *Vienna Convention on the International Sale of Goods* (1980), and also conventions that are not officially binding but nevertheless exercise influence on the behavior of commercial partners (soft law).

Soft law consists of rules which are not binding, but are nevertheless influential. A typical example are the *Unidroit Principles of International Commercial Contracts*.

Arbitration Moreover, disputes in commercial relations are often dealt with by means of *arbitration*, decisions made by persons who are not official judges but whose decisions are accepted by the parties who invoke their services.

On arbitration and other forms of alternative dispute resolution, see Sect. 13.1.1.

Because much of the *Lex Mercatoria* operates outside the traditional framework of national states and their relations towards each other and towards their legal subjects, it also provides counterevidence to the exhaustive nature of the Westphalian duo.

1.7.4 Transnational Law

The phenomenon that is illustrated by human rights, European Union law, and the *Lex Mercatoria*, namely that there are many and important legal phenomena that do not fit in the picture of law that arose after the Westphalia peace treaties, has become known under the name of *transnational law*. Transnational law might

summarily be characterized as law that is not made or not enforced by national states or that is not meant for the regulation of behavior of legal subjects within nation states or the mutual relations between nation states. This is a negative characterization: transnational law is law that does not belong to the Westphalian duo. The increasing importance of this branch of law marks an important development in the long history of the law, which gives rise to new questions about the nature of the law.

Recommended Literature

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Sources of Law

2

Jaap Hage

The question whether a particular rule is also a legal rule can have a large practical importance because the answer may determine whether the rule will be enforced by state organs. Lawyers have developed a number of standards to determine whether a rule has the status of law, and these standards are known as the sources of law. In this chapter, we will take a closer look at these sources of law. More particularly, we will address the following questions: what is a source of law (Sects. 2.1 and 2.2), and which sources of law are recognized (Sects. 2.3–2.7)?

2.1 Sources of Origin

The idea that legal rules always stem from a source may derive some of its plausibility from the fact that the notion of a legal source is ambiguous. There are legal sources in at least two senses of the term "legal source":

- sources of origin,
- sources of legal validity.

> Apart from sources of origin and sources of validity, it is possible to distinguish "knowledge sources." Some sources can be used to find out what the law is. For instance, by inspecting the texts of treaties, legislation, judicial decisions, and doctrinal literature, one can find out what the content of the law is.

Customary Law The notion of a source of origin is closely related to the different ways in which legal rules and principles can exist. We have seen in Chap. 1 that law was originally customary law, that the law consisted of rules that were in fact used and accepted as binding. For this reason, customary law is usually seen as a source

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of law, and this means simply that part of the law exists (or existed) in the form of customary law.

Rationalist Law Other parts of the law, such as legal principles—and also human rights to the extent that they and their interpretation have not been codified—are counted as law because it seems reasonable that they are part of the law. This phenomenon is strengthened further if reasonable rules and principles find recognition in legal doctrine or even in documents that acquire the status of soft law. In this sense, reason is also a source of law.

Created Law By far, most laws are created law, law that was laid down by a body that had the power to do so, such as a legislator, a court (in the common law tradition), or states that have entered into a treaty. Therefore, legislation, cases, and treaties are also seen as sources of law.

What all these cases have in common is that they represent ways in which the law, as a matter of fact, has come into existence. Law originated from custom, reason, doctrine, legislation, precedent, and treaties, and this is expressed by saying that custom, reason, doctrine, and so on are sources of origin of law. This observation—that the law has come into existence in a number of different ways—is no more than a mere matter of fact, which has no legal significance. Sources of origin as such have no relevancy to the content of law. This is different from validity sources, however.

2.2 Sources of Validity

The legal relevance of validity sources has to do with two related phenomena:

1. Legal rules can be created by persons who, or institutions that, have the power to do so. These rules, which are valid because they were created by recognized rule makers, are called institutional rules.
2. The "sources thesis" holds that only those rules can be legal rules that stem from a source of law: from a validity source.

> This sources thesis is strongly connected to legal positivism, a view according to which the law is something that is *made* (see Sect. 14.2.2).

We have seen that, in the course of history, legal rules came into existence in different ways, representing different sources of origin of the law. All these sources are forms in which the law has, as a matter of fact, appeared in the course of history. The fact that the law has appeared in these forms does not mean that the rules were considered to be law *because* they appeared in this form.

> Judicial decisions in the civil law countries illustrate this point nicely. In the civil law tradition, judges are not bound by the decisions of their predecessors or higher courts. Nevertheless, these decisions lead to law in a way that is different, but not so very different, from the way in which they lead to law in the common law countries. Precedents are not

considered to be binding, but are nevertheless treated as law. Because precedents are in fact treated as law, they are a source of law in the sense that they are a form in which law originates. But there is no legal duty to treat them as law. Therefore precedents in the civil law tradition are merely a source of origin of the law, but not a validity source.

Nowadays, most legal rules are valid legal rules for the reason that they were *laid down* with the intention that they would become part of the law. In other words, currently most laws are *positive law*. This seems so obvious that it requires some explanation as to why it is actually not obvious.

2.2.1 Social Rules

There are two ways in which a rule can exist within a social group, namely as a social rule and as what may be called an "institutional rule." A social rule exists within a group if the members of this group tend to follow this rule, if they see violations of this rule as a reason for (self-)criticism, and if they believe that the other members of the group do the same.

An example would be a club of film lovers. They have the rule (but not a legal rule) that a member of the club has to go to the cinema at least once a week and should write a review of the film for the website of the club. The existence of the rule manifests itself mainly in that most members do in fact go to the cinema every week and write about it. Moreover, if a member of the club does not go to see a film in a particular week, she tends to reproach herself for that, and the other members of the group may criticize her for this reason. Moreover, she expects that other club members also feel somewhat guilty if they did not go to the movies and also expect criticism for that reason.

This situation should be distinguished from a group of teenagers who only have the custom to visit the cinema every week and to blog about it afterwards. If they do not go to the cinema in a particular week, neither do they feel remorse, nor do they see not going as a reason for criticism. These teenagers have a custom or habit, but no rule.

Social rules can only exist if they are, by and large, effective. This effectiveness requires that the members of the group in which the rule exists tend to comply with the rule, as well as that they consider violations of the rule as a reason for criticism.

2.2.2 Institutional Rules

Institutional rules exist if their existence follows from the application of some other rule. This other rule may, for instance, hold that all the rules created by Parliament are valid rules.

Such a rule exists in (almost) all legal systems, but merely as a rule of customary law. It is not formulated explicitly.

In that case, a rule exists and is valid if it was made by Parliament. Another example would be that a rule was created by means of a contract. A rule about contracts would then hold that rules created by means of contracts are valid.

There is of course a difference between rules created by Parliament and contractual rules. The former bind everyone in a country, while the latter only bind the contracting parties.

Effectiveness Not Required Effectiveness is *not* a condition for the validity of institutional rules. If, for example, Parliament has made a rule that hardly anybody obeys, this rule may still be a valid rule.

The rule that pedestrians are forbidden to cross the street if the crossing signal is red is an example of such a valid rule, which is violated on a very large scale in the Netherlands.

Most of the time, however, a valid institutional rule will be an effective rule.

If an institutional rule is not used anymore (*desuetudo* in Latin), this may be seen as a reason to assume that the rule has lost its validity again. It this has happened, effectiveness had some influence on the validity of an institutional rule.

Most Rules Institutional Nowadays, most legal rules exist as institutional rules. They are valid legal rules *because* they satisfy the conditions of some other rule that specifies which rules count as valid legal rules. Most often, this other rule gives the power to make new rules to some person or institution. If this person or institution then exercises this rule-making power, the rule counts as a valid legal rule.

A typical example would be the rule that confers on Parliament the power to make statutory rules. If Parliament exercises this power and makes a statute, the rules in this statute count as valid legal rules *because of the power conferring rule*. These statutory rules therefore exist as institutional rules. They are valid legal rules, independent of whether they are effective.

2.2.3 Sources of Validity, a Schema

A rule makes something into a source of legal validity if it assigns legal validity to what stems from this source. In common law countries, judges are under a duty to follow the precedents created by their own court or higher courts. This rule of *stare decisis* makes precedents in common law jurisdictions into a source of validity for the law. In the civil law tradition, the most important validity source is legislation. Rules that are made in the form of legislation are, for that reason, valid legal rules. Characteristic of a source of legal validity is that rules that stem from such a source are, *for that reason*, valid legal rules (see Sect. 14.2.2). Figure 2.1 illustrates the phenomenon of validity sources.

The "highest" rule, which is itself not based on any other rule, is the constitution. The constitution itself contains a number of rules that guide behavior (which tell people what they should do), such as human rights rules, and it also contains rules that empower institutions, in particular the legislator, to make additional rules.

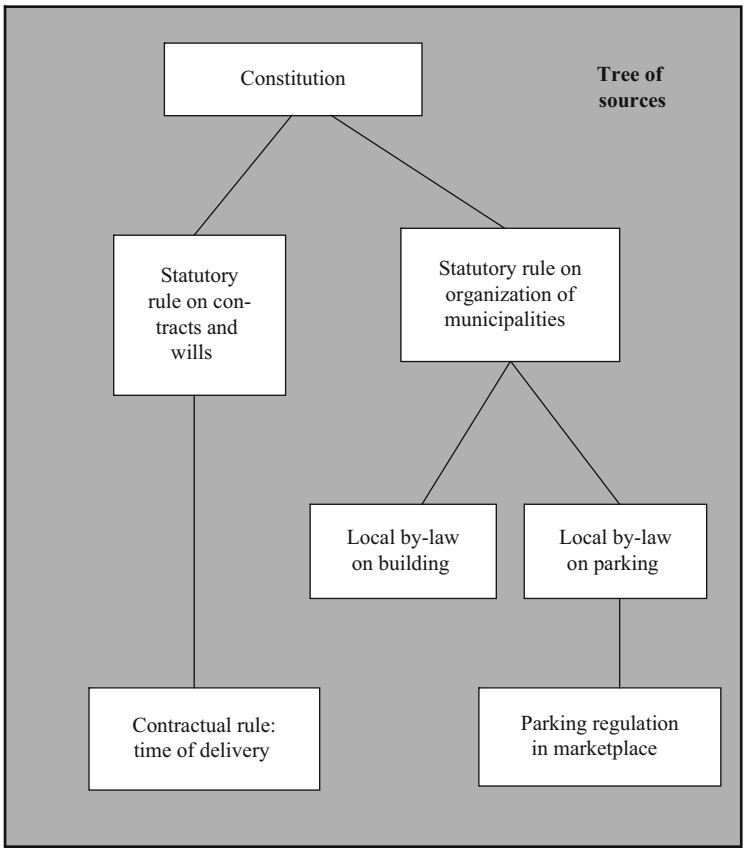
Constitution
Tree of sources
Statutory rule on contracts and wills
Statutory rule on organization of municipalities
Local by-law on building
Local by-law on parking
Contractual rule: time of delivery
Parking regulation in marketplace

Fig. 2.1 Tree of sources

The legislator has used its power to create statutes, and these statutes contain both rules that guide behavior and rules that empower other institutions and also private persons to create even more rules. In this way, a hierarchy of rules results.

> For instance, a rule of private law will empower citizens to make last wills and contracts. These last wills and contracts then contain additional rules which guide behavior. A rule of constitutional law will empower the council of municipalities to make so-called "by laws," rules which have only a local scope of application. One such by law may deal with building in the municipality, while another by law may deal with parking in the municipality. It is certainly imaginable that the rules about parking empower Mayor and Aldermen of the municipality to point out parking places, and if this power is used, these decisions by Mayor and Aldermen count as valid law too.

The rules that empower institutions and citizens to create more laws make the decisions of these institutions (e.g., bylaws and contracts) into validity sources of law. The rules that are created by these bylaws and contracts are valid legal rules *for the reason that they stem from these bylaws and contracts*.

2.2.4 The Sources Thesis

Institutional rules are rules that exist (are valid) because they were created by a person or a body that had the power to do so. Nowadays, most legal rules are such institutional rules. However, the sources thesis claims that *all* legal rules are institutional rules. Only rules that stem from a validity source, and which are therefore institutional rules, would be legal rules. This means that a court that is to apply the law should only consult validity sources such as legislation, case law, and treaties to find legal rules. If one adopts the sources thesis, it matters what counts as a validity source because it is necessary to find such a source for every valid legal rule.

> In the Netherlands there was a constructor who built a house for a person called Hubertus te Poel. Hubertus had pointed out a piece of ground where the house could be built. What the constructor did not know was that this ground belonged to the brother of Hubertus, Heinrich te Poel. As a consequence, Heinrich became the owner of the house that was built. (The owner of ground also owns what is built upon the ground.) When Hubertus could not pay for the house, the constructor wanted his money from Heinrich, who had become richer because the house belonged to him.
>
> Morally speaking, it was obvious that Heinrich should pay for the house. (The more so because it looked as if Hubertus and Heinrich had conspired to fool the constructor; but that could not be proven.) However, the Dutch Supreme Court had to answer the question whether Dutch *law* (as opposed to morality) contained a rule to the effect that if because of an event one person became richer and another one poorer without a good reason, the person who became richer should compensate the person who became poorer. According to the Supreme Court, the Dutch law (of 1959) did not contain such a general rule allowing compensation for unjustified enrichment. The Supreme Court could not find such a rule because it confined its search to the validity sources of Dutch law, and because it did not count reason as a validity source.

2.3 Legislation

Legislation is a way to create new rules and to modify or derogate existing ones. The products of legislation have different names, such as "statute," "act," "decree," "bylaw," and many more. Sometimes, a large collection of related laws is called a "Code" or (in German) a *Gesetzbuch*.

Legislation is both a source of origin and a validity source of law. Part of the law has been created or codified in the form of legislation, and therefore legislation is a source of origin of the law. For those legal rules that have come into existence as a result of legislation, and which are for instance not merely codified customary law, the legislation is also the validity source.

> The English Sale of Goods Act, for instance, contains valid English law, because the rules in this Act were created by means of legislation. Legislation is the validity source for the rules contained in this Act.

In order to be able to create law (we will, for the remainder, ignore modification and derogation), an institution (or, less common, a person) must have the

competence to do so. Let us call such an institution or person a "legislator." The *competence* of a legislator is always confined to making laws that apply to

- particular persons (e.g., persons with a particular nationality) and/or
- a particular territory (e.g., the territory of a state or a municipality) and/or
- a particular subject matter (e.g., food security or financial markets).

Trias Politica In order to avoid an overly high concentration of power in the hands of a few individuals, it is desirable to divide the powers of the state among different organs. A common way to accomplish this is to assign different functions of the state to different organs. Administration would then be performed by a different organ than adjudication, and legislation would be performed by yet another organ. This division of state functions among three different institutions is known as the *Trias Politica* (see Sect. 8.2.2).

An additional ideal in this connection is that state organs that exercise legislative powers are, at least in part, made up of representatives of the people.

> Parliament plays a role in legislation on a national level in all EU Member States. On a sub national level, a municipality often has some kind of community council, which will also play a role in legislation.

In this manner, there is a safeguard that the people to which the rules apply have a say in the content of these rules.

2.3.1 Layers of Law

This idea of the Trias Politica is still very much focused on legislation performed by a national state and on rules that apply to the nationals or the territory of such a state. The resulting picture is misleading because actually there exists legislation on many levels, including the subnational and the supranational levels, and there is also legislation that is not even linked to a particular territory.

In most of Europe, the highest level of legislation is that of the European Union (EU). The EU is competent to create rules in the form of *regulations*, and these rules are binding not only upon the Member States themselves but also inside the Member States, that is the Member States' legal subjects. The scope of application of these regulations is the whole of the EU.

> The EU can also make so-called *directives*, which obligate Member States to create rules with an aim that has been specified by the EU. These rules will be the result of the national legislation of these states, but their content is mostly determined at the EU level. See Sect. 10.3.1.

At the level of national states, there will be a legislative body in which Parliament is somehow involved. This body can create laws that apply in the whole state and/or to all of its nationals. If a national state is a federation, this means that it has what can be called "substates."

These "sub-states" are called "states" (USA), *Länder* (Germany), or *gewesten* (Belgium). Federations are discussed more extensively in Sect. 8.2.1.

Substates will have legislative bodies too, which are competent to make rules for their own territories. Provinces, municipalities, and other subnational entities also have legislative powers.

Soft Law There are also rules that are not officially binding but are nevertheless influential (see Sect. 1.7.3). Examples of this soft law are the Draft Common Frame of Reference (2010), a set of model rules for European private law drafted by legal scholars, and the Universal Declaration of Human Rights (1948), brought about by the General Assembly of the United Nations. It is not easy to say something in general about this type of "legislation," but its importance is growing, and soft law should therefore be included in an overview of kinds of legislation.

2.3.2 Principles to Deal with Rule Conflicts

There is not even a guarantee that all legislation brought about by one body is consistent, but if there are several bodies that produce legislation that can apply to the same case, such as national laws and laws of provinces, this is almost a guarantee that there will be some conflicts of rules. To deal with such conflicts, several principles have been developed over the course of time. Here we will focus on three of them.

Lex Superior Sometimes rules stand in an order based on a hierarchy between legislative bodies. This is, for instance, usually the case if in a particular state legislators operate on different levels. Then the rules of the "central" legislator are considered to be superior to the rules of the local legislators. The *Lex Superior* principle then holds that in case of conflict, the superior rule precedes over the inferior rule.

Thus, *Lex Superior* holds that national laws would prevail over laws of the province and that laws of the province prevail over municipal laws. Another example would be the prevalence of EU law over the national laws of the EU Member States.

Lex Specialis It is very difficult for a legislator to foresee all possible situations to which a rule may apply. As a consequence, a rule may be either overinclusive or underinclusive. A rule is *overinclusive* if it literally applies to cases in which it was not meant to apply.

An example would be a prohibition for any cats and dogs to be present in a butcher's shop, which is not meant to apply to guide dogs for the blind.

A rule is *underinclusive* if it does not apply to cases to which it was meant to apply.

An example would be the rule against cats and dogs in a butcher's shop, which should also apply to the monkey which Mrs. Jackson likes to take for a walk.

Both problems can be dealt with by means of a rule that deals with the specific situation. This specific rule will be in conflict with the more general rule, to which it is meant to be an exception. This conflict is dealt with by means of the *Lex Specialis* principle because this principle brings about that the more specific rule prevails over the more general rule.

The position of guide dogs might be dealt with by the rule that it is allowed for blind persons to bring their guide dog to all public places. This rule would be more specific than the prohibition for butcher's shops and would therefore prevail over it according to the *Lex Specialis* principle. Notice, by the way, that it is not always easy to see which of two conflicting rules is the more specific one.

Lex Posterior Most of the time, when a new rule is created that is in conflict with a preexisting rule, the old rule is simultaneously and explicitly derogated from. However, in cases where this has not happened, the *Lex Posterior* principle may be useful. It states that the newer rule prevails over the older one.

2.4 Treaties

From a Westphalian perspective, there is a big difference between legislation and treaties. Legislation is a way to create law for the internal use of a state. This law is brought about by national legislative organs that most often have a strong democratic input. Treaties, on the contrary, are a kind of contract between states by means of which their mutual relations are dealt with. Because treaties would not contain general rules that bind citizens, the democratic input into their creation would not have to be as strong as is deemed necessary in the case of legislation that does bind citizens.

This picture of the difference between legislation and treaties is mostly outdated. Treaties do not only deal with relations between states anymore. They have also become a way to create legal rules that deal with legal relations that transcend national borders. The most prominent example of this new function of treaties is human rights treaties, which assign rights to individual citizens. Another example is the treaties that have established the EU. These treaties created institutions such as the European Commission and the Court of Justice of the European Union, which have a direct influence on the lives of European citizens.

In light of this new perspective on treaties, legislation and treaties are both ways of rule creation, even if by means of different legislative organs. Whereas legislation is a form of rule creation by national and subnational legislative bodies, treaties are a form of rule creation by cooperating states.

According to the *Vienna Convention on the Law of Treaties*, a treaty is an agreement between states. However, these days it is assumed that international organizations such as the United Nations and the European Union can also be parties to treaties.

Another difference between legislation and treaties is that the scope of application of legislation will usually be confined to the territory of the legislating state, while treaties will normally deal with international relations or, at least, cases that are not limited to national borders.

> Human rights, for instance, do not only concern the relationship between human beings and the state on whose national territory they happen to be, but also those between human beings and other agents in general, including states.

2.5 Case Law

As a source of law, the decisions of courts play a role that is somewhere in between being merely a source of origin and a source of validity. We have seen above that legal decisions for concrete cases tend to influence future decisions because they function as a kind of precedent.

2.5.1 Civil Law Tradition

Like Cases Alike In the civil law tradition, where a precedent does not officially bind courts, the influence of earlier decisions will depend on at least two factors. One factor is the demand of justice to treat like cases alike. If one case has been decided in a particular way, it is often assumed that it is unjust to treat a subsequent case, which is deemed similar in all relevant aspects, in a different way.

> It is not immediately clear where this alleged injustice lies. The most plausible reason would be that the law has not changed between the two cases. If the first case was decided correctly, then the second case should be decided similarly, because the law is still the same. This would be a matter of logic, though, and not so much of justice.

Rationality A strongly related reason is the rationality of the earlier decision. If the earlier decision was rational, and especially if this rationality is clear from the way in which it was argued, a departure from this earlier decision in a new similar case would be irrational.

Legal Certainty The second factor is the demand of legal certainty. If an earlier case was decided in a particular way, this may create expectations among legal subjects with regard to the contents of the law and the way in which future cases will be decided. To give a different decision in a future case not only would be a violation of these expectations but also would create uncertainty that is detrimental to the functioning of society.

> Suppose that someone sold a sick cow and expected, on the basis of an earlier judicial decision, this to be an irreversible sale because the buyer could have seen that the cow was sick. The seller therefore could proceed to use the money he received from the buyer to buy a new calf. If it was possible for the sale to be reversed, this might bring the seller into

financial difficulties. The fear of such financial difficulties may lead the seller to refrain from re-investing the money, and that would hamper further economic activities in society.

These two factors mean that earlier judicial decisions can have a strong influence on future judicial decisions and therefore, indirectly, also on the content of the law. However, because judges are not bound by precedents, judicial decisions do not create new law. Case law is therefore not a source of validity in the civil law tradition but merely a source of origin. Case law is law because it is broadly accepted as such; it is not institutional law.

Indirect Authority Because precedents are not binding in the civil law tradition, judicial decisions cannot be motivated by reference to case law. What happens, therefore, is that judicial decisions are motivated by reference to statutory law and that case law is used to argue why the rules that are based on legislation have the scope that is necessary to base the actual decision on. The authority of case law is consequently indirect in the civil law tradition.

For instance, it may have been decided that an involuntary French kiss counts as a form of rape. The person who forced this French kiss upon his victim can be condemned for violating the statutory prohibition on rape, and the case law is then used to argue why he raped his victim in the sense of the law.

2.5.2 Common Law Tradition

The two above-mentioned reasons why precedents should be followed also apply in the common law tradition, and perhaps because of them the rule of *stare decisis* was adopted. Courts in the common law tradition are legally bound by their earlier decisions and by decisions of higher courts. This means that case law in the common law tradition is not only a source of origin for the law but also a source of validity. A rule may be a valid legal rule for the reason that it was adopted in an earlier court decision.

Ratio Decidendi In the common law tradition, judges are not bound by every element of an earlier court decision but only by its *ratio decidendi*. This *ratio decidendi* consists of the decisive grounds that made the court take the decision. Apart from these decisive reasons, the court may have mentioned other reasons that are relevant but did not determine the court's decision. These other reasons are called *obiter dicta* (things that were also said), and courts are not bound by these *obiter dicta*.

It is not always easy to distinguish in an old case between the *ratio decidendi* and the *obiter dicta*. This lack of clarity can be used by a court to interpret the precedent in a particular way. As a consequence the court has the leeway to adapt the law to what it deems is reasonable.

Distinguishing The binding nature of precedent only applies to future cases that are *similar* to the already decided case. In this connection, "similar" means identical

in all the relevant aspects. This creates leeway for the development of law because a court that must decide a new case has to determine whether the new case is really similar to the alleged precedent. By pointing out relevant differences (distinguishing), the court can argue that the cases are not similar and that it is not bound by a particular precedent.

> Suppose, that the seller who sold a sick cow explicitly stated to the buyer that the animal was healthy. Would that make a difference to the buyer who bought the cow and who wants his money back? If the court decides to distinguish this case from the prior case, the law will be changed, because this decision will also function as a precedent for future cases.

Broadening It is possible that a court treats cases as similar when their similarity was not obvious. This is called "broadening."

> If a judge applies the rule that there will be no money back for unhealthy animals if their illness was detectable to a case involving defective products bought in a shop, the rule will be broadened considerably. This broadened rule will also come to function as a precedent.

Common law grows because the number of cases from which it results grows. In a sense, common law consists of the combined effects of all these previous cases. However, there are no clear rules because common law reasoning is not a matter of applying clear-cut rules but rather a matter of analogizing precedents. A new case has to be decided in a particular way, not because of a rule that was established in earlier decisions but because the new case is similar to an earlier case that was decided in that way. At least, that is the theory. In practice, lawyers distill rules from the body of precedents, and these rules are described in textbooks, where they are substantiated by reference to the cases in which they were adopted as *rationes decidendi*. These textbooks function as a knowledge source for common law, but it is the precedents that function as the validity source.

Restatement One step further than the summary of case law by means of textbooks is a restatement of the common law on a particular topic. Such a restatement, which is the work of legal scholars, is also a description of the rules on a topic, but it has a semiofficial status that is comparable to other forms of soft law. Courts are not bound to adopt the rules from a restatement as the law, but they often do because these rules accurately restate the already-established law in that jurisdiction.

> In the USA, the American Law Institute, an organization of legal academics and practitioners, has drafted restatements of the US common law on more than twenty subjects.

2.6 Customary Law

Usus Probably the oldest source of law is customary law. It is usually assumed that two conditions must be met so that we can speak of customary *law*. The first condition is that there must be a *custom* concerning a guideline for behavior. This

means that this guideline must be, by and large, effective because in the absence of effectiveness, it is hard to speak of a customary guideline for behavior. This first demand for the existence of customary law is usually called the demand of *usus*, which is the Latin word for "custom."

The second condition is that the custom is accepted as a binding one or—and this is meant to express the same thing—as a legal one.

> Earlier we discussed the custom of a set of teenagers to visit the cinema every week. If these teenagers do not feel obligated to go to the cinema and only see it as a good custom, there is no customary law. However, the duty to go to the cinema every week would be based on customary law if they accept their custom as binding and see violations as a ground for enforcement by collective means (which is highly unlikely).

Opinio Iuris The demand that a custom is accepted as (legally) binding is usually referred to as the demand that there exists an *opinio iuris*, the view that the custom is law, or an *opinio necessitatis*, the view that the custom is binding and necessary.

Customary law cannot be a validity source of law because something can only be customary *law* if it is already considered to be law. In other words, customary law exists as law in the sense of social rules; custom is merely a source of origin.

2.7 Legal Doctrine and Reason

Custom is a source of origin for the law because the fact that a rule is broadly accepted as a legal rule suffices for this rule to be a legal rule. There are also other factors that can bring about that a rule is accepted broadly as a rule of law, and two prominent examples are legal doctrine and reason.

Legal Doctrine Legal doctrine, the writings of legal scholars in which they describe the existing law and mix this description with evaluation and proposals for how the law should be, does not make the described and proposed rules into rules of law. However, these writings do influence legal decision makers, especially in cases where the positive law is not clear and where the proposed rules are well argued. As a consequence, rules proposed in legal doctrine may end up as rules that exist through being accepted as legal rules.

Reason If rules are *reasonable*, the chances are bigger that they will actually be used by legal subjects to govern their mutual relations and will develop into customary law. If a judge in a common law system must decide whether the present case is similar to a precedent, and if so to which precedent, he must judge which similarities and differences are relevant from a legal point of view. Such judgments are based on reason, and the outcome will become law through the *stare decisis* mechanism.

As these examples illustrate, being reasonable is a basis for rules to become part of the law. This is not because reason is a source of validity but because being reasonable is a factor that leads to law via acceptance.

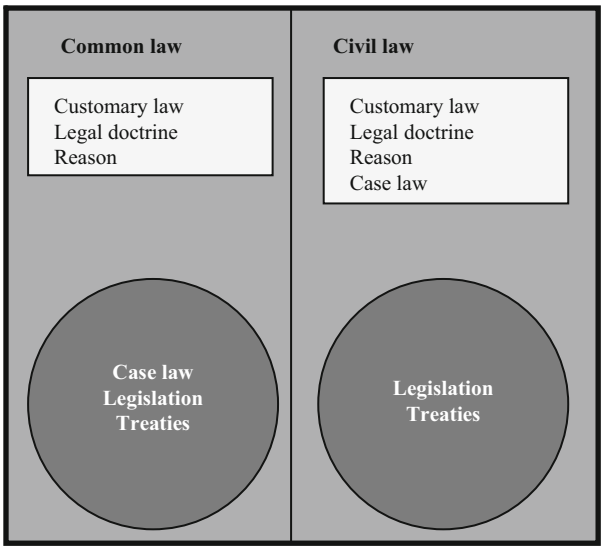

Fig. 2.2 Sources of law

Figure 2.2 indicates what the sources of law are, both in the common law tradition and in the civil law tradition. Validity sources are outlined in the circles. The rectangular box lists the sources of origin that are not, at the same time, validity sources.

Recommended Literature

Hart HLA (2012) The concept of law, 3rd edn. Oxford University Press, Oxford
Raz J (2009) Legal positivism and the sources of law. In: Raz J (ed) The authority of law. Essays on law and morality, 2nd edn. Clarendon, Oxford, pp 37–52

Basic Concepts of Law

3

Jaap Hage

3.1 Fields of Law

Law is not a homogeneous body of rules. In fact, it consists of many "fields of law" that sometimes exhibit large differences. Most of what has to be said about law is therefore included in the chapters that deal with the different legal fields, such as property law, constitutional law, international law, and criminal law. This section deals with the fields of law in a more general way. In particular, it focuses upon two major divisions within the law, namely the divisions between public and private law and between substantive and procedural law.

> Although both divisions are clear in principle, there are many legal fields on the boundaries which will not be discussed here.

3.1.1 Public Law and Private Law

One major division between fields of law is the division between public and private law. In this division, the role of the government plays a central role. Simply stated:

- public law is that part of the law in which the government as such plays a role, while
- private law is that part of the law in which the government as such does not play a role.

The above characterizations refer to the government "as such" because the government can act as a private party. One example of this is that the police owns a number of police cars. This is not different from ownership by a private person.

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Private Law Private law deals with the mutual relations between citizens. Both *property law* and *contract law* are major branches of private law, which regulates things such as sales, ownership, and mortgages. A third branch of private law is *tort law*, which deals with the compensation for damage that occurs when there is no contract. Again, other branches of private law are *family law* (marriage, adoption, right to a name) and the *law of commerce*, which regulates, for instance, the transport of goods.

A special branch is *private international law*, which determines which laws are applicable if a case is connected to the law of more than one jurisdiction. For instance, it determines which family law governs the divorce of persons with different nationalities.

3.1.1.1 Public Law

Ciminal Law In public law, the government as such plays a role. There are four main branches. The best known branch is often *criminal law*. This is a branch of public law because the tracing, prosecution, and punishment of criminals are performed by, or on behalf of, the government.

Constitutional Law A second important branch of public law is the law that organizes the state and the government. This branch is called *constitutional law* and deals with the division of government powers (Trias Politica), the functioning of democracy, the creation of legislation, and the relationship between central and local government agents. Traditionally, it also deals with human rights, but that field also falls under public international law.

Administrative Law The third branch, which probably covers the most extensive part of public law today, deals with the many interactions between government agents and civilians or private organizations. This part is called *administrative law*. Administrative law has many branches of its own, including social security law, environmental law, and tax law.

International Law International law, the law that regulates relations between states and international organizations, is also a branch of public law and is therefore sometimes also called *international public law*.

3.1.1.2 European Union Law

European Union law illustrates that the division between private and public law is not always clear-cut. On the one hand, there are treaties between the European Union (EU) Member States in which the main institutions of the EU are regulated. These rules very much resemble the constitutional law of the individual Member States and would therefore be a kind of public law. As this law is created in the form of treaties between states, it is a kind of international public law.

On the other hand, the institutions of the EU make law themselves. This law deals with the organization of the EU, in a manner similar to constitutional law, and it also deals with the relationship between citizens and companies within the EU. There are, for instance, EU rules about fair competition, and part of these rules focus on citizens and companies. Arguably, these rules are a form of private law.

3.1.2 Substantive and Procedural Laws

A second, twofold division of the law, which is perpendicular to the division between public and private law, is the division between substantive and procedural law. *Substantive law* consists of rules that determine what people should do and that give people rights.

Not everyone always complies with all duty-imposing rules, nor are all the rights of persons always respected. Therefore, if law is to function well, it has to provide means through which compliance with duties and respect for rights can be enforced. These means are given by *procedural law*. This field of law provides the rules for court procedures and for the organization of the judiciary. It also includes rules that specify how judicial orders can be enforced.

There are branches of procedural law for each of the major branches of substantive law. This means that there exist rules for *civil procedure*, which deal with the enforcement of private law. There are also rules for *criminal procedure*, which specify how criminal suspects can be traced, prosecuted, and—after conviction—punished. And there are rules of *administrative procedure*—indicating, for example, how environmental law or tax law can be enforced.

The European Union has its own procedural rules, which govern, among others, the operation of the Court of Justice of the European Union.

3.1.3 "Functional" Fields of Law

European Union law is not unique in not fitting well within the established divisions between public and private law and between substantive and procedural law. In fact, there are many fields of law that have traits of both private and public law and/or both substantive and procedural law. Those fields of law are sometimes called "functional" fields of law because they are characterized by the function they fulfill rather than by belonging to one of the main areas of law. The function then consists mainly of the topic that is regulated by the field, such as the environment (environmental law) or information and communication technology (ICT law).

The relationship between the main areas of law and the functional fields can be depicted as in Fig. 3.1.

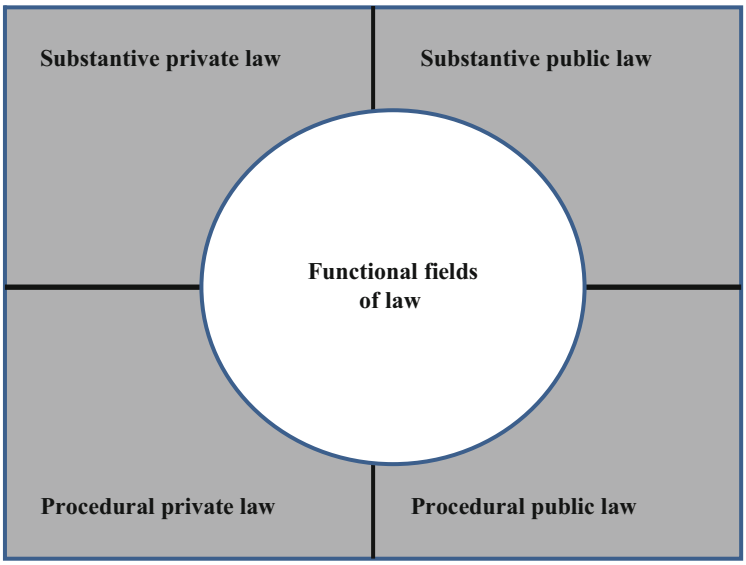

Fig. 3.1 Functional fields of law

3.2 Rules, Operative Facts, and Legal Effects

Functions of Rules A common misunderstanding about law is that it consists of rules that prescribe behavior. This is a misunderstanding for at least two reasons. First, although it is possible to see the law as a collection of rules, this is only one way of looking at the law. Another way to see the law would be as a form of behavior of people who are especially involved in the law, such as judges, legislators, and legal practitioners. Second, even if the law is seen as a set of rules, these rules do not all prescribe behavior. In fact, by far, most legal rules do not prescribe behavior. Earlier we already mentioned rules that give definitions and rules that create competences. Still other rules create rights, describe procedures, bring institutions to life, and probably do much more.

Structure of Rules Although there are many different kinds of legal rules, most of them have in common the characteristic that they can be seen as having a conditional structure. They have a condition part, which states when the rule is applicable, and a conclusion part, which indicates what the consequences are when the rule is applied.

> The structure of rules is not always obvious from the literal wording of the rule. This is also true for rules made by means of legislation or a treaty. Take for instance Book 1, Section 7.1 of the German Civil Code, which reads (if translated into English):
> "A person who settles permanently in a place establishes his residence in that place."
> With some good will, the following conditional structure can be discovered in this rule:

"IF a person settles permanently in a place THEN this person has settled his residence at this place."
The need to reconstruct rule formulations in an "If-Then" structure holds *a fortiori* for rules which have to be distilled from judicial decisions, such as the *ratio decidendi* of a decision.

Operative Facts A legal rule is applicable to a case if the facts of the case satisfy the conditions of the rule. The facts of a case that match the conditions specified by the rule are called the operative facts.

Suppose that Claus Ziegler settled himself permanently in Bonn. This fact is an operative fact because of the rule in Section 7.1 of the German Civil Code.
Other examples of operative facts are:
– If someone passes away. This has many legal effects, but one of them is that the property of the deceased person can be inherited by his heirs.
– If someone commits theft, because then this person will (normally) be punishable.
– If a legislator creates a statute, because then new rules come into existence.
– If a court pronounces a verdict, because then the content of this verdict (e.g. that damages should be compensated) becomes a legal obligation.

Legal Effects If a rule is applied to a case, this rule attaches legal effects to the case.

If the rule of Section 7.1 of the German Civil Code is applied to the case of Claus Ziegler, then the legal effect is that Claus Ziegler has settled his residence in Bonn. The above examples can also function as examples of legal effects.

Dynamic Rules There are at least three kinds of legal effects that can result from the application of a rule. Some rules lead to new facts as the result of some event. Because these rules bring about changes, they may be called "dynamic rules."

Some examples:
– If a person commits a crime, this person is punishable from that moment on.
– If two persons enter into a labor contract, they have obligations towards each other from that moment on.
– If a company receives an environmental permit, it has the permission to build a plant from that moment on.

Counts-as Rules Other rules have the effect that some "things" from a legal point of view also count as something else. These rules will be called "counts-as rules."

Some examples:
– If a person wilfully destroys the property of someone else, this act counts as a *tort* (to which the obligation to compensate the damage is attached).
– If a servant in the baker's shop hands over a loaf of bread to a customer, this counts as a *transfer of ownership* of the bread.
– If Parliament votes in a particular way, this counts as *adopting a bill*.

Fact-to-Fact Rules Still other rules bring about that if a particular kind of fact is present, some other kind of fact is present too. These two kinds of facts tend to go together. The rules that connect kinds of facts in this way will be called "fact-to-fact rules."

Some examples:
- If someone owns a good, this person will normally also be competent to transfer the ownership of this good.
- If someone holds real estate (e.g. a house), this person will be obligated to pay real estate tax.
- If a student participates in a course, he is permitted to do the exam of that course.

3.3 Legal Subjects

Natural and Legal Persons Legal rules impose duties upon, and assign competences and rights to, legal subjects. These legal subjects are typically human beings, but in theory the law can give the status of a legal subject to anyone or anything it wants. For example, a foundation, a company with limited liability, a state, and a municipality, all of these can—and in many countries do—count as legal subjects. Human beings are called "natural persons" (*personnes physiques*, *natürliche Personen*), while organizations that have received the status of legal subjects are called "legal persons" (*personnes morales*, *juristische Personen*).

The consequences of being a legal subject vary from one field of law to another. In criminal law, being a legal subject means that one is addressed by rules of criminal law and can become punishable in case of violation. Natural persons are legal subjects in this sense, but it is not evident that legal persons are also addressed by criminal law rules.

For instance, does it make sense to speak about "mens rea" in case of a municipality?

In public law, natural persons are protected by the human rights that are assigned to them. Human beings have a right to privacy, freedom of expression, freedom of religion, and a right to physical integrity. Not all of these rights make equally sense in the case of legal persons. It is thinkable that a legal person (for instance, a newspaper company) exercises its freedom of expression, but it is not immediately clear what the protection of physical integrity would mean in the case of legal persons.

In private law, important consequences of being a legal subject are that one can have rights, such as property or a claim to be paid money, and that one can perform juridical acts. These consequences pertain to both natural and legal persons.

For example, both a private person and a foundation can own property, and both a natural person and a company with limited liability can contract.

3.4 Juridical Acts

The law is dynamic, both in the sense that the rules change in the course of time and in the sense that the legal positions of individual persons are subject to modifications.

For instance, Jeanine Dabin was first the owner of a Lamborghini sports car, and then later, because she sold it, she no longer owned it.

These changes in the law are mostly the result of the application of a dynamic rule; they are legal effects. However, not all of them just happen; some of them were brought about intentionally.

If Jeanine Dabin sold her car, she intentionally brought about her loss of ownership of the car.

In general, it would be attractive if legal subjects, whether they be private citizens, organizations, or government agents, were to be able to change the law as they deem fit because that would add to the autonomy of these agents. Of course, not everyone should be able to bring about any change he likes. Private persons should, for example, not be able to appropriate what belongs to other persons, nor should they be able to marry two other persons who do not want to be married. A municipal legislator should not be able to create rules that apply to everyone in the world, and the EU should not be able to prohibit European citizens from expressing their opinions. However, within certain limits, legal subjects should have the power to change legal positions or even legal rules. This power is given to them through the possibility to perform juridical acts.

The phenomenon of juridical acts exists in most, if not all, legal systems of the world. The concept of a juridical act, however, has mainly become popular in the legal systems that belong to the civil law tradition. In common law countries, one rather speaks of the exercise of a legal power.

A consequence of this difference between legal cultures is that the English term "juridical act" has not reached the level of general usage. Alternative expressions in English are "legal act" and "legal transaction". More common are the German term "Rechtsgeschäft" and the French term "acte juridique".

Definition A *juridical act* may be defined as an act performed with the intention to bring about legal effects, where the law connects these legal effects to the act for the reason that they were intended.

Examples of juridical acts are contracts, last wills, legislative acts, judicial decisions, and administrative dispositions.

In Germany, the notion of a juridical act (*Rechtsgeschäft*) is confined to private law. This means that legislation, judicial decisions and administrative dispositions, which belong to public law, would not count as juridical acts in Germany.

Factual Acts Sometimes it is useful to dispose over terminology to refer to acts that are not juridical acts. For instance, a municipality can pursue its parking policies both by creating prohibitions (which is a juridical act) and by making it physically impossible to park in certain places. We will use the expression "factual acts" to refer to acts, usually performed by the administration, that are not aimed at creating legal consequences.

Competence We have already seen that not everyone can bring about a legal effect by means of a juridical act. To begin with, juridical acts that belong to the sphere of public law, such as legislation, cannot be performed by ordinary citizens. Moreover, private persons cannot normally impose obligations on persons other than themselves. In general, there is a limitation on the kinds of juridical acts that can be performed by particular agents and on the kinds of legal effects that can be brought about by means of juridical acts. This limitation is handled through the demand that someone can only bring about particular legal effects by means of a particular kind of juridical act if he has the competence to do so.

If a person or organization attempts to perform a juridical act for which such person or organization lacks the relevant competence, the act in question will not normally have the intended legal effects. The act is then said to be *null* or *void*.

Sometimes the act has legal effects, despite the incompetence of the agent, because the act has created justified expectations that the laws want to honor.

> For instance, if a public servant has granted a building permit without having the relevant competence, legal certainty may nevertheless require that the permit is valid, at least until some official action has been undertaken.

Often, the juridical act can then be *nullified* or *avoided*, meaning that the legal effects are taken away, for instance, on the basis of a judicial decision.

3.5 Duties and Rights

Two of the most important notions in the law are those of "duty" and "right." It is sometimes thought that the two are closely related in the sense that the duty of one person corresponds to the right of another and the other way round. As we will see, that is not the case in general.

3.5.1 Duties, Prohibitions, and Permissions

Duties The notion of a duty is closely related to that of a prohibition and that of permission. Two factors are important in connection with duties:

1. the agents who are under the duty,
2. the kind of action to which the duty applies.

Addressees Duties are meant to guide persons in their behavior. This means that duties are always addressed to one or more agents.

> We use the general term "agent", because as well as real persons, groups of persons and organizations can also be under a duty.

Sometimes a duty addresses everyone. This is, for instance, the case with the duty not to torture. A duty can also address a set of one or more agents, such as the duty that rests on John Doe and Jean Doe to clean away the snow from the pavement before their house. An in-between version is that a duty rests on everyone who satisfies particular conditions, such as the duty for all car drivers to carry a driver's license.

Content of Duty Every duty has a *content*, which indicates what the addressee of the duty is supposed to do. The action that a duty prescribes can both be doing something and abstaining from doing something.

> An example of a duty do something is the duty to pay one's income tax. An example of a duty to abstain from something is the duty not to commit theft.

Prohibition A *prohibition* is nothing more than a duty to abstain from something.

> The duty not to commit theft is therefore the prohibition of theft.

Implicit Permissions Permissions come in two forms. Often permission is nothing more than the absence of a prohibition. This is what might be called an *implicit permission*.

> If we say that it is permitted to walk on the grass, this means nothing more than that it is not prohibited to walk on the grass.

An implicit permission is not really something; it is rather the absence of something, namely the absence of a prohibition, the absence of a duty to abstain from something, which boils down to the same thing.

Explicit Permissions However, there are also *explicit permissions*.

> Police officers, for instance, are usually permitted to carry out a body search on suspects of serious crimes. This permission is not merely the absence of a prohibition. In fact there *is* a prohibition: it is in general forbidden to search persons in this way. However, along with this general prohibition there exists an exception for police officers in connection with suspects of serious crimes. Police officers are permitted to do what no-one else may do, namely to search suspects of serious crimes.

In general, explicit permissions make *exceptions to prohibitions*. For this reason, they need to be stated explicitly. It is not necessary to formulate a rule to create an implicit permission because implicit permissions do not have to be created. They are nothing other than the absence of a prohibition. Explicit permissions need to be created because they only make sense if there is a general prohibition. The

permission is then needed to limit the scope of this prohibition, and to that purpose an explicit permission is necessary.

> Such an explicit permission can take the shape of a more specific rule, which is an exception to the general prohibition (E.g. "Police officers are allowed to use proportionate violence in the exercise of their function"). It can also take the shape of an individual permission, such as a construction license provided to a citizen who wants to build a home for his family.

Permission and Competence Two concepts that are easily confused are those of permission and competence. Nevertheless, there are clear differences between the two. Permission has to do with what a person is allowed to do. Any kind of action can be the object of permission. Moreover, if one does what was not permitted, the result is that one acted unlawfully.

Competence, on the contrary, has nothing to do with what is allowed; it deals with what is *possible*. Competence is a precondition for the intentional creation of legal effects *by means of a juridical act*. If one tries to perform a juridical act for which one lacks the required competence, one will normally not succeed in bringing about these effects. Still, the attempt to do so does not have to be illegal.

> For instance, if an ordinary citizen tries to create a statute, this is not necessarily illegal, but an attempt to do so will lack the intended consequences (the legislation will be considered non-existent or void) because ordinary citizens lack the required competence.

3.5.2 Rights

There are different kinds of rights, which differ considerably from each other. If one seeks a common denominator for the different kinds of rights, there are two characteristics that most (but not all) rights share:

1. rights are interests that are protected by law,
2. rights can be disposed of by the right holder.

The different kinds of rights can, with some good will, be grouped under three headings, that is, rights regarding a person (*rights in personam* or claims), rights regarding an "object" (*rights in rem*, from the Roman word "res," which means "object" or "thing"), and liberty rights.

3.5.2.1 Claims and Obligations

The rights that most closely correspond to an obligation are the rights regarding a person or, more briefly, claims. Legal obligations are the result of events to which the law, most often private law, attaches an obligation as its legal effect. Typical examples of such events are contracts and the unlawful events that are grouped together under the denominator "torts."

> A tort is an illegal act, such as one that causes a traffic accident. If the tort caused damage, the tortfeasor (the agent) will have to compensate for it. (Tort Law is discussed more fully in Chap. 6.)

Take for instance a sales contract. When two parties have entered into a sales contract, the seller is under an obligation to deliver what he has sold. The buyer has a corresponding right to delivery. This right is only directed to the seller and is therefore a right regarding a person. Such a right is also called a "claim". The word "obligation" is used both for the obligation that is the counterpart of the claim ("obligation" in the narrow sense) and for the combination of the obligation in the narrow sense and the claim that resulted from the contract ("obligation" in the broad sense).

The claim is more than merely the flip side of the obligation. Most claims can be transferred to someone else, and the holder of a claim usually can (i.e., has the competence to) waive his right, thereby bringing an end to the corresponding obligation.

3.5.2.2 Rights Regarding an Object

Where claims correspond to obligations and are therefore rights that someone does something (or abstains from doing something), rights regarding objects are essentially relations between the right holder and the object of the right. The most familiar example of such a right regarding an object is the right of ownership, which the owner has with regard to the owned object. Other examples of rights regarding objects are copyright and mortgage.

> Rights regarding objects are usually called "property rights". They are the topic of Chap. 5.

What sets off rights regarding objects from claims is that the latter can only be invoked against the specific person who is bound by the corresponding obligation, while the former can be invoked against potentially everyone. The owner of a car, for instance, can in principle invoke his ownership against everyone who happens to have the car in his possession.

> The French speak in this connection of a "droit de suite", a right to follow the object of the right wherever this object may find itself. See also Sect. 5.1.1.

A right regarding an object normally goes together with a general prohibition for everyone except the right holder to use, damage, or destroy the object of the right. The right itself can then be seen as including an *explicit permission* to use, damage, or destroy this object.

3.5.2.3 Liberty Rights

Liberty rights are usually a category of human rights. They involve an explicit permission to do something, such as expressing one's opinion, becoming a member of a political party, or casting a vote.

> The right to cast a vote is more than only a permission; it also involves a competence.

The right goes further than merely the permission, however. Precisely because it is a right and not an "ordinary" permission, the permission cannot easily be withdrawn. A government that recognizes the right to vote cannot simply cancel the permission if it wants to.

There is no generally acknowledged view as to what precisely the right adds to the simple permission, but it is clear that *some* protection is added.

3.6 Summary

Rules

- Rules attach legal effects to operative facts.
- *Dynamic rules* add new facts to the occurrence of an event.
- *Counts-as rules* bring about that some things count in the law as something else as well.
- *Fact-to-fact* rules attach the presence of one fact to the presence of some other fact.

Juridical acts

- Juridical acts give legal subjects the *power* to bring about legal effects intentionally.
- *Dynamic rules* attach *legal effects* to the performance of a juridical act because the agent *intended* to bring about these effects with this act.
- Juridical acts require the agent to be legally *competent* to perform this kind of juridical act with these effects.

Duties

- Duties involve a relationship between the addressee of the duty and some kind of act that the addressee is to perform.
- *Prohibitions* are duties to abstain from doing something.
- *Implicit permission* to do something is nothing other than the absence of the prohibition to refrain from doing it.
- *Explicit permission* is an exception to a prohibition.

Rights

- *Claims* are rights against one or more particular legal subjects (*rights in personam*).
- Claims combine with *obligations* in the narrow sense to form obligations in the broad sense.
- These obligations are the result of a particular event to which a dynamic rule attached the presence of the obligation as a legal effect.
- *Rights in rem* (on an object) are relations between the right holder and the object on which the right rests.

- Usually they involve *explicit permission* by way of exception to a *general prohibition* that holds for all nonholders of the right.
- Often they also involve special powers and competences.
- *Liberty rights* involve explicit permissions, usually in combination with some special legal protection of these permissions.

Recommended Literature

Hohfeld WL (1920) Fundamental legal conceptions as applied in judicial reasoning, and other legal essays. Yale University Press, New Haven

The Law of Contract

4

Jan Smits

4.1 Introduction

Modern society is unthinkable without the possibility to conclude binding contracts. Not only that contracts allow businesses to trade goods and offer services, but contracts are also used by citizens to pursue the things they are after, even if they do not always realize it. Thus, people conclude contracts when they buy products in a supermarket, rent an apartment, take out insurance, open a bank account, download software, take up a new job, are treated by their doctor, go to the hairdresser, or order tickets over the Internet to go to a Lady Gaga concert. The set of rules and principles that governs these transactions is the law of contract. It governs not only so-called consumer contracts like those just mentioned but also commercial contracts. One only needs to browse through a random newspaper to find examples of the latter. They range from contracts for the sale of goods to franchising and distribution contracts and also include agreements to create a joint venture, take over a company, build an airport, or invest in a foreign country.

> Contract law is such an integral part of present society that it is almost impossible to imagine society without it. However, societies without contracts are conceivable in situations where the State or the community takes care of everything, including the provision of the necessities of life (such as, in today's world, food, housing and health care). In such a society, the need to contract with other people is absent. It is not only Communism that provides – at least in theory – an example of such a society. A better example is the type of community that existed in prehistoric times before there was any division of labor: small groups of nomadic people who shared what they found by hunting, fishing and gathering had nothing to contract about among themselves or with other groups.

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Exchange The core of a typical contract is exchange: one party gives something to another party and receives something in return. This exchange is prompted by the belief of both parties that they benefit from it: the buyer offers to buy goods because she values these more than the money she holds in her pocket, whereas the seller would rather have the money than the goods. Yet while this economic rationale underlies most contracts, it is not true for all contracts. In particular, in the case of *gratuitous contracts*, such as a promise to make a gift, the law can make the promise enforceable even if only one party will benefit from it.

Questions This chapter presents the main questions that contract law seeks to answer. These questions are structured in accordance with the chronology of the contract. The first question is when exactly there is a binding contract: can any promise to do or to give something (or to abstain from it) be enforced in the courts? Once we have decided that a contract has been validly concluded and is enforceable, another question emerges: what is it exactly that the parties should do as a result of this? This question may seem superfluous when parties have agreed upon all their mutual obligations under the contract, but the reality is different: in many cases, disputes arise about what parties are actually bound to do. Contract law provides the tools to establish the exact contents of the agreement. If it is clear that the contract is binding and we know about its contents, yet another question can arise: what rights does a party have if the other party does not perform? Can a contracting party then always claim performance of the contract? Can it bring a claim for damages? Or is it even possible for it to claim termination of the contract, meaning that the frustrated party no longer has to perform itself? These three questions on formation, contents, and remedies are discussed in Sects. 4.3–4.5. They are preceded by Sect. 4.2, which is devoted to an overview of the sources of contract law, and followed by Sect. 4.6, which offers a brief outlook on the topic.

4.2 Sources of Contract Law

Contract law in the sense mentioned above (as a set of rules and principles that governs transactions among parties, thereby setting the rights and obligations of these parties) is made up of a large number of different rules. In this section, a distinction is made on the basis of the origins of these rules. Such a categorization on the basis of *sources* allows us to distinguish between three types of rules relevant to contract law: rules that are made by the contracting parties themselves, rules that emerge from the official national, European and supranational sources, and, finally, informal rules that are made by others (including nonstate organizations and academics).

4.2.1 Rules Made by the Contracting Parties

Freedom of Contract Compared to many of the other fields of law discussed in this book, contract law is special in at least one important respect: the question of what the law is (in the sense of the enforceable rights and obligations of the parties) can, to a large extent, be decided by the parties themselves. This is because one of the most important principles in this field is freedom of contract: not only are parties free to decide whether they want to contract at all and with whom, but they can also determine the contents of their contract. This means that no one is obliged to enter into a contract, but if one *does*, one is bound by it in the same way as if the rules had been made by the legislature. The French Civil Code of 1804—drafted in the heyday of the autonomy of the individual citizen—encapsulates this succinctly in its famous Art. 1134: "Agreements lawfully entered into take the place of the law for those who have made them."

General Conditions Contractual rules need not be made for one contract only. In practice, parties often make use of standardized sets of rules that are suited to their own interests. So-called general conditions are one very popular type of such standardized rules. Almost all professional parties (including supermarkets and retailers) use such conditions for the contracts they conclude with consumers or other professional parties. The advantages of this are clear: it saves a party from having to draft contract conditions for every new contract it wants to conclude. This makes the use of general conditions indispensable in a world as dominated by efficiency as ours.

4.2.2 Official National, European and Supranational Rules

Default and Mandatory Rules It is clear that, in most cases, party agreement alone cannot set all rights and obligations under the contract. Often, parties only discuss those elements of the contract that they consider essential (such as the price and the time of delivery), but not many other aspects (such as the place of delivery or what will happen if the other party does not perform the contract). In so far as such matters are not covered by general conditions, the law should provide so-called default (or "facilitative") rules that are automatically applicable if the parties have not made any other arrangements. It may also happen that parties would like to contract in a way that is considered contrary to law or morality (such as hiring someone to steal a painting or—to give a more disputed example—paying someone to give birth to a baby). In that case, the law must intervene with so-called mandatory rules that declare such a contract void or at least avoidable by one of the parties. These facilitative and mandatory laws flow from the "official" national, European, and supranational sources.

National Rules At the national level, the official contract law is primarily produced by the legislature and the courts. And despite many differences in detail,

contract law is arguably the field of law in which we find most commonalities among the world's jurisdictions.

In civil law countries, general rules on contract law can be found in civil codes. Thus, the French *Code Civil* places contract law in its Third Book on ways to acquire ownership, whereas the German *Bürgerliches Gesetzbuch* has general provisions on juridical acts (*Rechtsgeschäfte*) in Book 1 and specific rules on contracts in Book 2. This does not mean that case law is not important: the older the civil code, the more important it is to take cognizance of the decisions of the highest national court in order to understand contract law properly. Together with the code, many countries often have more specific statutes in which contract law can be found (France for example has a separate Consumer Code) and we should also note that national civil codes have frequently undergone major changes over the years (such as the German law of obligations that was fundamentally revised in 2002).

In the common law, the starting point is rather the opposite: contract law is to a large extent laid down in cases decided by courts, but statutes (including the important Sale of Goods Act 1979 in England) have come to play an increasingly important role in the last century. Most of these rules created by national legislatures and courts are facilitative and it is clear why the State should provide these: in most cases, it is impossible for the parties to imagine all the contingencies that may occur during the lifecycle of the contract and, for those they do not foresee, they do not want to invest the time and the money to formulate contractual rules.

European Rules Contract law also flows from European sources. In the last two decades the European legislature has promulgated almost 20 directives with relevance to contract law, which the Member States have had to implement in their national legislation. However, unlike national contract law, the European legislature can only create law in so far as a competence to do so is provided in one of the European treaties. For contract law, the source of this competence is usually found in Art. 114 of the Treaty on the Functioning of the European Union, which allows the European legislature to adopt measures harmonizing national provisions "which have as their object the establishment and functioning of the internal market." The result is a rather fragmented European contract law: directives only deal with specific contracts (e.g., package travel, doorstep sales, and consumer sales) and only with certain aspects of these contracts (e.g., information duties vis-à-vis the consumer and the possibility to withdraw from the contract).

Supranational Rules A third source of official contract law consists of supranational rules. The most important international convention in this field (and arguably in private law as a whole) is the 1980 United Nations *Convention on Contracts for the International Sale of Goods* (CISG). The CISG has been ratified in more than 75 countries and contains rules that apply to commercial cross-border transactions. If the contracting parties reside in a country that has ratified the CISG, these rules are applicable to the contract unless the parties have explicitly excluded this.

As Germany and the Netherlands are both a party to the CISG, a contract between a German and a Dutch businessperson is therefore governed by the rules of the convention on, e.g. formation of contract and remedies.

4.2.3 Informal Rules

Soft Law As is the case in many other areas of law, contract law is increasingly influenced by rules that are not officially binding but have the status of soft law. This soft law can take the form of model rules, which are intended to influence the setting of norms or deciding of cases by the formal institutions (including the European and national legislatures and courts), or can be a source of inspiration for parties having to draft a contract. In addition to these two functions, soft law rules have come to play an important role in legal research and in teaching the law.

> The best-known soft law rules in the field of contracts are the Unidroit Principles of International Commercial Contracts (UP) of 1994, the Principles of European Contract Law (PECL) of 1995, and the Draft Common Frame of Reference of European Private Law (DCFR) of 2009. All three sets can be seen as "restatements" of the law: they aim to identify commonalities among the jurisdictions they seek to cover and to put these down in succinct common "principles." In so far as commonalities were difficult to find, the drafters made a choice for what they considered to be the "best" rule. Although these sets of rules are not formally binding, they are often seen as a blueprint for a future legislative instrument in the form of, e.g., a European Code of Contracts. In the remainder of this chapter, reference is made in particular to the PECL.

4.3 Formation of a Binding Contract

As long as economic activity consists only of exchanging goods on the spot (as was the case in early societies), there is no real need to answer the question as to when a contract is binding. This is different from the moment a party *promises* to do or to give something in the future. The law should then provide an answer to the question whether this promise is enforceable or not (meaning that the promisee can go to court and force the promisor to, e.g., deliver the good or pay the price). This section considers when there is a basis for such an enforceable promise: Section 4.3.1 looks in general into the requirements that the law applies in order to determine whether a promise is binding, while the subsequent sections consider how the contracting process usually takes place (4.3.2) and whether any formalities need to be fulfilled and how the weaker party is protected (4.3.3). The final section pays attention to what happens if a party breaks off contractual negotiations (4.3.4).

4.3.1 From a Promise to a Binding Contract

No legal system allows all promises to be enforceable. If I promise my fiancée to take her to dinner tomorrow evening, no sensible person would claim that she can go to court and force me to feed her. Of the vast majority of promises that we make in our life, we can say at best that it would be *morally* wrong not to keep them. Breaking a promise may also have many negative consequences for the friends that we keep, for the people we love, and for the reputation we have—but none of this is

the law's business. A contrary view would make society unlivable and would flood the courts with futile cases. This makes it important to ask what the criterion is for the *legal* enforceability of promises.

Intention to Be Legally Bound All modern jurisdictions accept that the main criterion for the enforceability of a promise is the intention of the parties to enter into a legal relationship. The PECL puts this succinctly in Art. 2:101 s.1 in stating that a contract is concluded "if the parties intend to be legally bound" and "reach a sufficient agreement." This principle is the end result of a long historical process.

> It is not self-evident that parties can bind themselves by merely expressing their intention to be legally bound. In fact this principle was not accepted on the European continent until the seventeenth century. In Roman times, only specific types of contract were seen as enforceable, for example because they were in a certain form, or consisted of the actual handing over of the good. Roman law also recognized purely "consensual" contracts, but only in a limited number of cases (including sale of goods and mandate). It was only with the development of the economy and with the growing influence of natural law in the seventeenth century that the general principle of all contracts being enforceable on the basis of consent (*pacta sunt servanda*) came to be recognized.
>
> English law underwent a similar development; it sought to base the enforcement of promises on a particular doctrine called *consideration*. The English courts found such consideration to be present if a promise met all the requirements for its enforceability. The requirement still exists today, but as modern English law also adheres to the view that a contract requires the intention to be legally bound, the separate consideration doctrine has become much less important – its main role today lies in making gratuitous promises unenforceable (see *below*).

It is important to realize that the question whether there is an intention to be legally bound is a *legal* question: the law decides when such an intention exists. It is usually not a problem to "find" this intention in cases where the respective promises of the parties are more or less of the same value or if the parties are sophisticated businesspeople who can take care of their own interests. However, the law is much more reluctant to enforce purely gratuitous promises or promises among family members or friends, as it finds it much less likely that someone would wish to be legally bound in these situations. The law, suspicious as it is of altruism, presumes that a party will only bind itself *legally* if it is to gain from the transaction.

Gratuitous Promises A purely gratuitous promise, such as the promise to make a gift, is usually viewed with so much suspicion that most civil law jurisdictions require this promise to be put in a *notarial deed*. This forces the donor to think through his act of benevolence and allows an independent notary (in most countries, a trained lawyer) to warn the donor of the consequences of his act.

Consideration Under English law, a gratuitous promise is equally unenforceable but for the reason that it does not have consideration. Consideration requires that there is a *quid pro quo*: the promise must be given for a (promise of) counterperformance by the other party, and it is clear that a gratuitous promise lacks such consideration. In the absence of a notary as in the continental model, English law

therefore requires the donative promise to be put in a *deed*. This written and signed document that is attested by witnesses may not offer the same security as a notarial deed on the continent, but it does make the donor reflect upon his plan to perform an act of altruism and forces him to put his promise in precise writing.

Unequal Obligations A promise need not be purely gratuitous for it to raise suspicions about the earnestness of the intention. I can sell my car worth €20,000 for €10, or my neighbor can allow me to live in her house on the sole condition that I regularly water her plants. These contracts do not require any particular form, but whether or not they are enforceable depends on how likely it is that the court will find an intention to be legally bound on the part of the promisor. Decisive is whether the promisee could reasonably expect from the words and the conduct of the promisor that the latter intended to be bound, which is probably dependent on what the reasons for making the promise were and what the consequences would be for the promisee if the promise were to be held unenforceable. Thus, in the examples above, if the buyer of my car already sold her own car in reasonable reliance on my promise or if I immediately gave notice to my landlord after hearing my neighbor's generous offer, thereby leaving me without a home if she could renege on her promise, there are strong arguments to show that there is a binding contract.

Promises in the Domestic or Social Sphere Another category of cases concerns promises in the domestic or social sphere. If a father promises his daughter to pay for her driving lessons if she does not smoke until she is 18 years old, no sensible lawyer would advise her to take her father to court if he does not keep his promise. But how about my colleague's promise to pick me up every working day around 07.00 and "carpool" me to Maastricht? This promise already lies more in the economic sphere, and it would depend on the exact circumstances of the case to what extent I could claim, at the very least, compensation for the time it takes me to find an alternative way of getting to Maastricht.

4.3.2 Offer and Acceptance

We saw in the previous section that the consent of the parties is a necessary requirement for a binding contract. Lawyers tend to split this consent into two different elements: an *offer* by the offeror and the *acceptance* of this offer by the offeree. Art. 2:201 s. 1 PECL is a good reflection of the world's legal systems on this point:

> A proposal amounts to an offer if:
> a. it is intended to result in a contract if the other party accepts it, and
> b. it contains sufficiently definite terms to form a contract.

Lawyers usually ask three different questions regarding offer and acceptance:

1. When can a proposal be qualified as an offer?
2. Can the offeror go back on its offer before acceptance by the offeree (*revocation*)?
3. At what moment in time does the acceptance of the offer lead to a binding contract?

4.3.2.1 Offer

The importance of the first question is immediately clear: if a proposal can be qualified as an offer, it means that a binding contract comes into being upon the mere acceptance of the offer by the offeree. This is exactly the reason why an offer can only exist if it reflects the intention to be legally bound and is sufficiently clear about the contents of the resulting contract.

> If Gary sends an email to Caroline in which he offers his car for sale, it needs to define at least the price and the main characteristics of the car (such as the type, the year in which it was built, the state it is in, etc.) before it can be seen as an offer that is definite enough – unless Caroline knows exactly what car and price Gary is referring to because of the previous contact between themselves. If the offer is not definite enough ("For sale: an interesting book"), it would at best be an invitation to enter into negotiations about a contract.

Not all jurisdictions make the distinction between offers and mere invitations to enter into negotiations in the same way.

> An advertisement in a newspaper in which goods are offered for sale would usually not be seen as a binding offer under English or Polish law, but it would be under French law. The display of goods in a shop is seen as an offer in French and Swiss law, but as a mere invitation to treat in English law.

Much more important than what the law in a specific jurisdiction says, however, is the need to recognize the policy reasons behind it. To consider an advertisement or display of goods in a shop as an offer means that the seller cannot go back on her intention. This is clearly in the interest of the prospective buyer, who may have been tempted to respond to the advertisement or enter the seller's shop, because of the attractiveness of the product being offered. He should not be confronted with a seller who can withdraw her proposal. It would, on the other hand, be unfair on the seller if she were forced to sell the product to anyone and everyone that is interested, even if the product is out of stock.

> It seems that Art. 2:201 s. 3 PECL fares a middle way between these two interests by stipulating that a proposal to supply goods or services at stated prices made by a professional supplier in a public advertisement or a catalogue, or by a display of goods, is presumed to be an offer to sell or supply at that price until the stock of goods, or the supplier's capacity to provide the service, is exhausted.

4.3.2.2 Revocation

Once it is established that the proposal amounts to an offer, a second question can arise: can the offeror revoke its offer before acceptance by the offeree? If Catalina offers her iPhone to William, it would be in her interest to be able to change her mind at any time and sell it to a higher bidder instead. It would, on the other hand, create hardship for William if he did not have at least some time to think about Catalina's offer and perhaps try to borrow money from a relative or a friend to buy the gadget. It is by balancing these two interests that each jurisdiction adopts its own solution.

The German (§ 145 BGB) and Dutch (Art. 6:219 BW) Civil Code protect the offeree in making an offer irrevocable for the period that is fixed in the offer (or for a reasonable period if no such period is fixed) unless the offer states explicitly that it is freely revocable.

English law adopts the other extreme by allowing an offer to be revoked at all times. As harsh as this latter position may seem, it is consistent with the English doctrine of consideration that one cannot be bound if the other party has not done or promised something in return (see above, Sect. 4.3.2).

French law adopts an intermediate position by allowing the offeror to revoke, but by holding her liable in tort (Art. 1382 Civil Code) if the offeree has acted in justified reliance on the offer. The civil law position seems to have been codified as the European model rule in Art. 2:202 PECL.

4.3.2.3 Acceptance

The third and final question is when the acceptance of an offer leads to a binding contract. This is a very relevant question in commercial practice: parties need to know at what moment they are bound to a contract because all kinds of rights and obligations may follow from this. Art. 2:205 s. 1 PECL aptly reflects the rule that many jurisdictions accept: "If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror." This rule also applies to electronic communication, in which case the acceptance is supposed to have reached the offeree if the message has entered his electronic mailbox.

A well-known exception to the widely accepted rule of Art. 2:205 s.1 PECL can be found in English law: in case the acceptance is sent by (regular) mail, the contract is concluded when the acceptance is dispatched by post. It is clear that this rule benefits the offeree, who can no longer be confronted with the revocation of an offer once he has put his acceptance in the mailbox. However, the importance of this "mailbox rule" is rather limited in practice: most communication in today's world takes place through email, fax or telephone, significantly limiting the time between the sending and the arrival of the message. To such instantaneous communication, the mailbox rule does not apply (as the English Court of Appeal made clear in 1955 in *Entores v. Miles Far East Corp*).

4.3.3 Formalities and Protection of the Weaker Party

If the consent of the parties is sufficient for the contract to be binding—as we just saw—this implies that no other formalities are needed. A fundamental principle of contract law is therefore not only that contracts are binding but also that they can come about in any form. It may be that it is often difficult to prove the exact content

of a contract if it was concluded orally, but there is no doubt that such a contract is valid as a matter of law. And yet, there are cases in which this is different. In Sect. 4.3.1, it was seen that gifts often require a (notarial) deed in order to make a party realize what it is doing and (in civil law) to allow a legal expert to give advice.

Consumer Protection However, in most cases in which formalities exist, it is to protect a party who is presumed to be weak vis-à-vis the other party. In particular, in European legislation, we find many rules that aim to protect the "weak" consumer against the professional seller or provider of services. The formalities cannot only consist of the need to put the contract in writing (as in the case of consumer credit) but must also include the need to comply with information duties: the professional party needs to provide consumers with all kinds of information on the product and often on their right to withdraw from the contract (as in doorstep selling and distance sales).

Withdrawal Rights Withdrawal rights allow the cancellation of a contract without giving any reason: consumers only need to return the good or send the seller a notice of cancellation within the "cooling off-period" (usually 14 days). This is an important deviation from traditional contract law, in which the binding force of contracts cannot in principle be set aside.

Withdrawal rights can for example be found in Directive 2011/83 on consumer rights (Art. 9), Directive 2008/122 on timeshare (Art. 6) and Directive 2008/48 on consumer credit (Art. 14). These statutory rights must be distinguished from the policy of many shops allowing the consumer the possibility to "bring back" the purchased product within a certain period: no shop is legally obliged to offer this service to the consumer. But once a seller has given this extra right to the consumer at the time of sale, it must keep its promise and take back the product.

Incapacity Another device to protect weaker parties is the institution of legal incapacity. The law considers certain persons to be incapable of entering into a valid legal transaction *at all*. In particular, two categories of people are put under this special protective regime: young children and the mentally ill. The law has to balance the interests of these weaker parties with those whom they deal with. In particular, in the case of mentally ill persons, it is not always apparent to the outside world that a party is not capable of making a rational decision.

> If Jack, on his weekly trip to the town close to the mental institution he lives in, buys a new car, it may not be clear to the local Mercedes dealer that he is dealing with a patient suffering from a psychiatric disorder. If, on the other hand, a 15-year old buys a copy of Richard Dawkins' book *The God Delusion* to enlighten herself, it should not be possible to invalidate this transaction, which is clearly in the interest of the incapacitated person.

In balancing the conflicting interests of the incapacitated and the parties with whom they deal, any legal system takes as a starting point that contracts entered into

by minors (in most countries, persons under 18 years of age) and by persons formally incapacitated by a court decision can be invalidated by their legal representatives (in the case of minors, usually their parents). This does not grossly violate the interests of the other party: in case of doubt, it can always ask for the ID card of the minor or check the national register of incapacitated persons.

Many jurisdictions also accept that the contract is valid anyway if it is to the benefit of the incapacitated person. This may be because someone contracts for necessities (like food or medicine) or because a minor is contracting for something that is seen as "normal" for someone of his age. A 10-year old can validly buy candy, but the seller of a scooter would have a hard time convincing the court that the parents of this child cannot invalidate the transaction. Rather important in practice is the fact that the parents may also *agree* with the minor's transaction, in which case the contract cannot be invalidated either.

Next to these more formal devices to protect a weaker party (usually allowing the weaker party to invalidate the contract), courts can make use of more subtle instruments to remedy information asymmetries among the parties or simply not allow a party to invoke a contractual clause for reasons of procedural or substantive injustice (see Sect. 4.4.2).

4.3.4 Precontractual Liability

The principle of binding force of contract suggests that a party is *only* bound towards the other party once the contract is concluded. This suggestion is wrong. Even during negotiations, a party might justifiably rely on the conclusion of the contract but be subsequently disappointed in this reliance because the other party breaks off the negotiations. In these situations, some jurisdictions allow this party to ask for compensation of the costs that have been incurred.

In particular civil law courts are prone to argue that such a *precontractual liability* can be based on the general principle of fairness and reasonableness (cf. Art. 6:2 Dutch Civil Code), on a specific liability for fault in contracting (cf. the German *culpa in contrahendo*, codified in § 311 II BGB), or simply on delict in general (cf. Art. 1382 French Civil Code). The underlying idea of such a liability is that negotiating parties have to take into account each other's interests because they would form, as it was once put by the French author Demogue, "un sorte de microcosme: c'est une petite société où chacun doit travailler pour un but commun qui est la somme des buts individuels poursuivis par chacun (. . .)". If Jaap from Maastricht enters into lengthy negotiations with Mark from Chicago and Jaap decides to travel repeatedly to the Chicago O'Hare Airport Hilton to discuss the deal, while Mark already knows he will sell to somebody else, this is not the type of conduct that most jurisdictions encourage. If Jaap can prove Mark's dishonest behavior, he would be able to claim back his travel costs from Mark.

In a more liberal – and perhaps economically more viable – legal system, the point of no return in contracting does not come to pass until the contract is actually formed. This is the

position of English law. In the famous case of *Walford v. Miles* (1992), the House of Lords held *per* Lord Ackner that "(. . .) the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest (. . .). A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties. (. . .)".

4.4 The Contents of the Contract

Once the contract is validly concluded, the second stage of its life begins: the parties have to perform in conformity with what they promised. Fortunately, this does not pose a problem in the great majority of cases, and the parties doing what they should do will then automatically lead to the extinction of the respective obligations. However, the law also needs to provide rules for those cases in which problems do arise. It can be that the parties are in disagreement about what they actually agreed upon (Sect. 4.4.1) or that a party refuses to perform because of the manifest "unfairness" of one or more of the contract terms (Sect. 4.4.2). A third problem arises when the contents of the contract are considered as illegal or immoral by the state (Sect. 4.4.3).

4.4.1 Interpretation

The law shares with literature and theology the characteristic that it is an interpretative discipline: legislative statutes, governmental decisions, treaties, and written contracts may be unclear and therefore have to be interpreted. In contract law, this interpretation often takes place implicitly, even without the parties realizing it. However, it may also happen that parties differ explicitly about what they actually agreed upon. If Newcom Ltd agrees that its customer Agri Gmbh is allowed to "give back" the machine it purchased within 3 months after delivery, it could well be that Newcom intended Agri to be allowed to terminate the contract only in the event of a defect with the machine, while Agri understood the term as allowing it to simply end the contract at its own will. This raises the question of how the contract should be interpreted.

Interpretation of contracts can take place starting from two fundamentally different positions. One view is to give preference to the intention of the promisor: since the words she used are only the expression of her intention, it is the intention that should prevail. The opposite view is to give priority to the declaration and therefore to the external expression of the intention, this being the only thing that is apparent to the other party.

The tension between giving priority to the party's (subjective) intention and to its (objective) declaration is clearly visible in the great codifications of private law. Art. 1156 of the French Civil Code requires the court to find the "common intention of the parties", but it also considers that unclear terms should be interpreted according to the meaning of the

contract and usage (Arts. 1158–1160). §133 BGB states as the aim of interpretation "to discern the real intention", but continues in §157 BGB with the rule that interpretation should take place "in accordance with fairness and reasonableness as understood in good commercial practice".

Reasonable Person All Euro'pean jurisdictions adopt a compromise between attaching importance to intention and declaration. As a general principle, interpretation is aimed at ascertaining the meaning that the text would convey to a reasonable person having all the knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract. The contract is thus interpreted in the way in which a reasonable person would understand it.

Civil law and common law reach this result from two different perspectives. In civil law countries, the subjective intention of the parties is the starting point: in case of a dispute the meaning that a reasonable man in the position of the party would give to this intention is decisive. In English law, it is rather the objective meaning of the words of the contract that is given preference, although this is also mitigated by what is reasonable. This is reflected in Art. 5:101 PECL:

"(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."

4.4.2 Unfairness of Contract Terms

Fairness and Reasonableness An eternal question of contract law is whether only "fair" contracts should be enforced. Until well into the nineteenth century, an important strand of thought was that without some equivalence among the performance and counterperformance, a contract of sale would not be valid. Indeed, this prohibition of *laesio enormis* can still be found in various European codifications, including Art. 934 of the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) of 1812, allowing a party to invalidate a sale for less than half of the value if it did not explicitly agree with it at the time of conclusion of the contract. This means that if a party did not know the true value of the good, it is allowed to ask for the good back.

Procedural Unfairness Contract law is impregnated with devices that aim to avoid so-called procedural unfairness. Such unfairness exists if a party is not able to form its will in a manner that is sufficiently free. If Amy holds Clint at gunpoint while telling him to sign a document, every jurisdiction would allow Clint to

invalidate the contract for threat (cf. Art. 4:108 PECL). And if a 4-year-old were to buy a Roman artifact from the online store of an Amsterdam antique dealer, his parents could invalidate the contract for incapacity (see Sect. 4.3.3).

Threat and Incapacity Threat and incapacity lead to an avoidable contract because the law presumes that the will of a party could not be formed in the right way. Other applications of such procedural fairness are *fraud* and *mistake*. In the case of the latter, a party contracts under an incorrect assumption: it can be under the impression that it buys a second-hand car in excellent shape, although it is in reality a death trap. While it is clear that this affects the proper formation of the party's intention to buy, it is less clear what this should lead to. The law has to find a balance between the duty of the buyer to investigate for himself what shape the car is in and the duty of the seller to inform the prospective buyer about possible defects. Each jurisdiction balances these interests in a different way.

General Conditions It was already noted (in Sect. 4.2) that many professional parties make use of general conditions. This poses a problem for the fairness of consumer contracts in particular. In practice, consumers that are confronted with these standard contracts cannot influence their contents (assuming they are able to understand them at all) and have to decide either to accept the general conditions or to not enter into the contract at all. Here, too, it is possible for the law to intervene on the basis of deficiencies in the formation of the contract, holding that—as Lord Bingham stated in the English decision of *Director General of Fair Trading v. First National Bank* (2001) in a case about consumer credit—the contract terms "should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. (. . .) Fair dealing requires that a supplier should not (. . .) take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position (. . .)."

However, practice shows that safeguarding procedural fairness may not be enough, particularly in the case of standard form contracts. Preceded by statutes in many individual Member States, the European legislature therefore issued Directive 93/13 on unfair terms in consumer contracts, allowing courts to hold a standard clause in a contract invalid "if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract." This test of *substantive* fairness invites the court to consider the actual contents of the contract, even if its formation did meet the necessary standard.

> While testing the substantive fairness of general conditions is now daily practice in the national courts of the European Union, this is different for the part of the agreement that the parties explicitly discussed. If Rafael is unequivocally clear about his intention to sell his Ferrari to Roger for only a tenth of its actual value but subsequently realizes that he has entered into a disadvantageous agreement, he cannot go back on his promise arguing that this contract is manifestly unjust.

The notion of good faith (fairness and reasonableness) referred to in Directive 93/13 is well known in civil law countries, even to such an extent that it is often

seen as a principle that permeates the entire law of contract or is even, as was once remarked, the "queen of rules." The English judge Lord Bingham excels in describing the principle:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing (. . .)."
>
> This fair and open dealing implies that parties have to take into account each other's legitimate interests, not only in interpreting the contract (which should take place in a reasonable way: see Sect. 4.4.1), but also in supplementing the party agreement with duties to give information to, and cooperate with, the other party. In countries like Germany (§ 242 BGB) and the Netherlands (Art. 6:248 s. 2 BW), the principle is even used to limit the exercise of contractual rights, namely where it would be grossly unfair to invoke a contractual provision.

4.4.3 Prohibited Contracts

Despite the prevalence of the principle of freedom of contract, parties are not free to enter into any contract whatever its contents. Every legal system places limits on the freedom of contracting parties by declaring contracts void if they are contrary to law, public order, or morality. If Marjolein were to sell nuclear arms to a terrorist group or if Jens were to agree to act as a hired assassin in return for a sum of money wired to his Swiss bank account, not many would doubt that these contracts interfere with the public interest and should not be enforced. The same is true for agreements among companies to divide the market among themselves and to refrain from competition.

Other cases, however, give rise to more doubt. One problematic category of cases is where it is not necessarily apparent to the other party that the contract is concluded to engage in an illegal activity.

> If I were to buy a knife in a nearby supermarket with the aim of killing my neighbor, it is not likely that I will tell the seller about this motive. But if the other party should reasonably know about my intentions, one can argue that this contract should be void as well.

Another type of case is where sensible persons would doubt the extent to which the contract violates public order or morality. This is, in particular, problematic if one would like to base one's decision on a notion of shared European values, as Art. 15:101 PECL suggests. This provision states that "A contract is of no effect to the extent that it is contrary to principles recognized as fundamental in the laws of the Member States of the European Union."

If Xaviera borrows money to set up a brothel, it is not likely that all European countries share one view on the validity of this contract.

But even within one country, views can differ on what should be recognized as fundamental.

Does it violate human dignity if Manuel, who is 25 years old and 114 cm tall, is employed in a discotheque by allowing himself to be thrown short distances onto an airbed by clients (so-called "dwarf-tossing")? This is a question of balancing the personal freedom of Manuel to work in the way he chooses with the responsibility of the State to guard people against themselves. The court may have a difficult job in deciding what national public morality has to say in this respect.

4.5 Remedies of the Parties

If the contract is validly concluded (Sect. 4.3) and if it is clear what the (valid) contents of the contract are (Sect. 4.4), a third question arises: what if the other party does not perform the contract? This *nonperformance* could be because the other party is not performing at all, is performing too late (delay), or is performing in the wrong way (defective performance). Every jurisdiction has an elaborate set of rules on the remedies that a party can claim in the event of such a breach of contract. These include the action for performance (Sect. 4.5.1), for damages (Sect. 4.5.2), and for termination of the contract (Sect. 4.5.3).

4.5.1 Performance

4.5.1.1 Civil Law Approach

It seems to follow from the principle of the binding force of contract that if a party does not perform, it can be forced to do so by a court of law. This is indeed the position of all civil law jurisdictions. In countries like Germany, France, and Poland, the claim for performance is seen as the natural remedy that follows automatically from the fact that a valid contract exists. And if a party does not abide by the court decision to perform, it can be forced to do so by an official (*Gerichtsvollzieher*, *huissier*, *deurwaarder* or *bailiff*) who would take the goods or the money from the defaulting party and give it to the creditor.

However, this main rule cannot always be applied. If the computer that Sarah sold to Lena is stolen from Sarah before delivery is due, it does not make much sense for Lena to claim performance. Such a case of *objective impossibility* also exists if performance is only useful if it takes place before a fixed date. If Christa is to marry on 8 August, it would be futile to claim performance from the manufacturer of the wedding dress on any later date.

In addition to these cases of objective impossibility, it can happen that performance is still possible but would cause the debtor unreasonable effort or expense. No reasonable person would require the seller of a ring who accidentally dropped it

in the river Meuse to dig it up, even though this would technically be possible at the expense of a large sum of money.

A final situation in which a claim cannot be brought is where performance requires specific personal qualities of the debtor, or as Art. 9:102 PECL states: "the performance consists in the provision of services or work of a personal character or depends on a personal relationship." A music company cannot force Coldplay to make a record to the best of its artistic ability, and the organizers of the Zurich Grand Prix cannot make an athlete run. This does not mean that contracts with artists or sportspeople do not contain provisions to this effect, but they only allow the other party to bring a claim for damages or termination in case of breach of the contract.

> It is clear why a court in these cases would not allow a claim for performance: not only would this turn the debtor into some sort of slave, but it is also difficult to believe that an unwilling debtor will in fact perform to the best of its abilities when being forced to do so.

4.5.1.2 Common Law Approach

Although the general availability of the claim for performance seems logical in view of the aim of the contract (to hold a party to its promise), common law adopts a different standpoint. Under English law, the normal action is for *damages*, so-called specific performance being the exception. There is a lot to say about the exact reasons for this radically different position, but in essence it finds its origins in an alternative view of the contract itself. This view is perhaps best expressed by the famous American judge and jurist Oliver Wendell Holmes, who wrote in 1881 that "... the only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised act does not come to pass. In every case it leaves him free (...) to break his contract if he chooses." This is a view of contract, not as a *moral* conception but as an *economic* device: people conclude contracts to increase their welfare, and if the debtor prefers to bring the other party in the financial position in which it would have been had the contract been properly performed, this is just as good.

However, English law does recognize that this so-called specific performance should be available in certain situations. This is why, in equity, it has long been recognized that if damages are "inadequate," the court can grant a claim for performance. In particular, in the case of contracts concerning specific goods (such as land, works of art, or other objects having unique qualities), the court allows the creditor to force the other party to perform *in specie*.

Generic Goods The difference between civil law and common law is best visible in the case of sale of so-called generic goods. These are goods that are readily available on the market, including bulk products such as (to name but a few) potatoes, bananas, water, oil, steel and plastics. In German, Italian or Dutch law, it is beyond doubt that the buyer of such goods can claim delivery from the seller. In

English law, however, the buyer has to satisfy itself with a claim for damages as these goods are not unique and can easily be found elsewhere. Art. 9:102 PECL also adheres to this view (cf. Art. III.3:302 DCFR).

This age-old difference between civil law and common law in the field of performance has considerably diminished as a result of European Directive 1999/44 on consumer sales. If a professional seller delivers goods to a consumer that are not in conformity with the contract, the consumer can require the seller to have the goods brought into conformity by repair or replacement.

4.5.2 Damages for Nonperformance

If performance of the contract does not take place at all, or is too late or defective, the creditor may have the possibility to claim damages for nonperformance of the contract. This is in line with the principle that an aggrieved party should be brought as much as possible in the position in which it would have been if the contract had been properly performed.

Common Law Approach There are two ways to reason about the availability of this claim. The first is to hold the nonperforming party liable simply because it did not perform. In this view, it does not matter whether the party was at fault or not: the mere fact of nonperformance gives rise to liability in damages. This is the position of common law, well captured in the English case of *Nicolene Ltd v. Simmonds* (1952): "It does not matter whether the failure to fulfil the contract by the seller is because he is indifferent or wilfully negligent or just unfortunate. It does not matter what the reason is. What matters is the fact of performance. Has he performed or not?" Even if the IT company could not help it that the network was down for more than a day, it still needs to compensate its customers.

Civil Law Approach The other way of reasoning is to allow a claim for damages only if the party in breach was at fault or can at least be held responsible for the nonperformance. This is the position of civil law jurisdictions. Thus, Art. 1148 of the French Civil Code states that no damages are due when the person who is to perform was prevented from doing so by an irresistible force (*force majeure*). This means, in most cases, that a party is freed from any liability if it can prove that it used its best efforts in performing the contract.

Despite these different mentalities of common law and civil law, both legal traditions come close in the practical results that they reach. If the Rolling Stones hired Wembley stadium for a series of three concerts and the stadium were set on fire by Manchester United supporters before the first concert took place, the rock group could not claim any damages because an English court would construe a so-called *implied condition*, according to which the parties are excused in case performance becomes impossible through no fault of their own (cf. *Taylor v. Caldwell*, 1863). Many civil law jurisdictions make use of a similar fiction, but

then to hold the debtor *liable* even though there was no fault on its part. They can do this by implying that the seller has given a *guarantee* that the goods it sold are fit for its purpose.

4.5.3 Termination for Nonperformance

If a party claims damages instead of performance, it still has to perform its own obligations. However, this may not be what a party wants. It can happen that it loses all confidence in its counterpart and simply wants to get rid of the contract, meaning that it is no longer bound to it, and if it already performed, it is allowed to give back the good or ask for the money back. The action for termination allows this, but it is clear that this action cannot be used lightheartedly in view of the interest of the nonperforming party in upholding the contract. If the bell is missing on the bike that Bart buys from Herman, this does not usually justify termination because the breach is not serious enough (although it would be possible for Bart to claim performance of the contract or damages). This is why legal systems only allow termination in respect of breaches that are sufficiently serious. The test for this is different in each jurisdiction. While English law holds that the breached contract term must be "essential," German law only allows termination in case of nonperformance of a *Hauptpflicht* (main obligation) or after a so-called grace period was given to the debtor within which it could still perform but did not. The CISG and PECL require a so-called fundamental nonperformance.

> Art. 8:103 PECL gives the following definition of fundamental non-performance:
> "A non-performance of an obligation is fundamental to the contract if:
> strict compliance with the obligation is of the essence of the contract; or
> the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or
> the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance."

4.6 Outlook

It was seen in the above that the three main questions in contract law receive different answers depending on the jurisdiction one looks at. One cannot say that one solution is necessarily better than the other. What is important, however, is to recognize that the different outcomes are usually based on underlying assumptions about the aim of contract law. At the risk of generalizing too broadly, one can say that English contract law seems more geared towards the interests of like-minded commercial parties, while civil law jurisdictions tend to attach high value to remedying an unequal position among the contracting parties. Both legal traditions thus offer alternative views of how to shape contract law.

Contract law cannot be separated from other fields of private law. In the civil law tradition, it is intrinsically linked to the fields of tort law and property law. Both contract law and tort law can give rise to so-called obligations, a legal term

indicating a (usually) enforceable duty of one person vis-à-vis another person or several other persons. While in case of a contract an obligation arises voluntarily because a party intends to be legally bound, in case of a tort the obligation is imposed upon a person independent of its intention, usually because the law wants to attach consequences to wrongful behavior. This distinction between voluntary and nonvoluntary obligations is as old as the civil law tradition itself: it was already set out as the *summa divisio* in a textbook for law students written by the Roman jurist Gaius in AD 160.

Property law deals, inter alia, with the consequences the performance of obligations may have for proprietary rights. The transfer of property or the creation of a real right (such as a mortgage; elsewhere in this book the term "lesser property rights" is used) is invariably accompanied by a contract in which the parties agree to transfer a good or create the mortgage. As a result, the sale of goods is said to have both contractual and proprietary aspects. It is contractual in that it obliges the parties to perform an obligation, i.e. for the buyer to pay a price and for the seller to deliver the good. The sale also has a proprietary aspect because it will lead to the transfer of property in the good, either because the property passes with the contract itself (as in France and Belgium) or because the seller's obligation to deliver the good is performed, leading to the actual delivery of the good (as in the Netherlands).

On a final note, it is important to emphasize that a particular characteristic of contract law is that it can often be subject to the choice of the parties: thus, commercial parties located in different countries can choose the national contract law of their liking to govern a contract, even if this is the law of a third country. This turns the availability of different approaches towards contract law into an enormous asset for the European Union: it allows parties to *opt in* to another legal system. This has not gone unnoticed by the European Commission and Parliament, which are now actively pursuing the idea of adding a 29th European system of contract law to the existing 28 national jurisdictions. Such an optional instrument would add to the choices that parties already have today and would also have the advantage that it could be made available in all official languages of the European Union.

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Property Law

5

Bram Akkermans

5.1 Property Rights and Property Law

Rights play an important role in private law. The owner of a car who has been damaged unlawfully by someone else has a right against the tortfeasor to be compensated (see Chap. 6 on Tort Law). The seller of a car has the right against the buyer of the car to be paid the price for which the car was sold (see Chap. 4 on the Law of Contracts). And, finally, the owner of a car has a right to the car itself. This last right differs from the former two. It is not a right against a particular person such as the tortfeasor or the contract partner; it is a right on a tangible object, namely the car.

5.1.1 Property Rights

Absolute and Relative Rights Rights against a particular person are called *personal rights* or *relative rights*. Rights that are not against a particular person are called *absolute rights*. These absolute rights always pertain to "something," and this "something" is called the *object* of the right. The objects of rights may be *tangible*, such as land, buildings, cars, and books. They may also be *intangible*, such as trademarks, intellectual property (including copyrights and patents), shares, and claims. Absolute rights in private law are called *property rights*, and *property law* is the branch of private law that governs these property rights. See Fig. 5.1.

Effects *Erga Omnes* Strictly speaking, property rights are not directed at any particular person, but because they pertain to an object, they have effect *erga*

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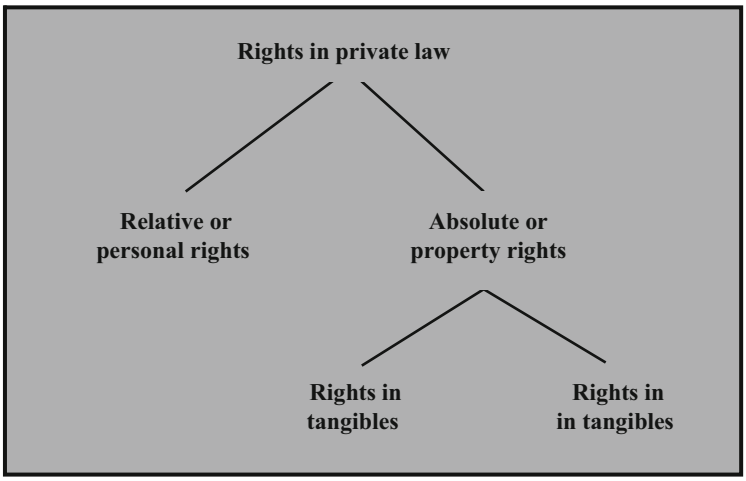

Fig. 5.1 Rights in private law

omnes. The expression *erga omnes* is Latin and refers to an effect against "everyone." Property rights are therefore rights with effect against everyone. This effect is a defining characteristic of property rights and means that property law, the law that governs property rights, differs from, for instance, the law of contract, which deals with legal relations between the contract parties only.

> If Peter is the owner of a car, nobody else in the world is entitled to use this car without Peter's consent. If Jane has contracted with Sam that Sam will clean Jane's house for some money, only Sam is under an obligation to clean Jane's house, and only Jane is under an obligation to pay Sam this money.

Droit de Suite An immediate consequence of the fact that property rights have effects against everyone is a phenomenon that is best known under its French name *droit de suite* (literally, "right to follow"). If the object of a right falls into the hands of a person who does not hold the right, the right holder can exercise his right against that person.

> For instance, Elisa has the property right of usufruct in a house which belonged to her former husband James. This right involves that Elisa is entitled to use the house as long as she lives. Suppose that James sells the house to Joan, who becomes the new owner of the house. Because Elisa's right pertains to the house, and is not a right specifically against James, Elisa is still entitled to use the house. Joan must respect the usufruct which Elisa has on the house. And if Joan were to sell the house again, the new owner must also respect the usufruct. The right which Elisa has on the house so to speak "follows" the house, regardless of whoever is the owner.

5.1.2 Property Law as a Cornerstone of (Private) Law

Property law governs the rights that legal subjects have on objects. These rights have an important function in society, and as a consequence property law forms the

basis for other areas of the law as well. When a person holds an entitlement to property, this invites the application of other areas of law, including the law of taxation, succession, and marriage.

> For example, a person who owns a piece of land is obliged to pay taxes on it, and a person who acquires ownership of a book must pay taxes (value added tax or VAT) on the purchase price. A person who inherits land from his parents will be an heir in succession law and must also pay taxes on this inheritance. Finally, when two persons get married, there will be a property regime between them, varying from common ownership to a forced separation of assets.

Because property law underlies other parts of (private) law, it is known as a cornerstone of private law; it forms the foundation on which other parts of law are built.

5.1.3 Central Questions

This chapter deals with a number of central questions of property law. The first question, addressed in Sect. 5.2, is why there should be property rights and property law at all.

The second question is what the main types of property rights are in the common law and in the civil law traditions. This question will be answered in Sects. 5.3–5.5.

Although there are different property rights, they have a number of characteristics in common. In Sect. 5.6, the question what these common elements are will be answered by discussing seven principles and rules of property law.

The fourth question concerns the dynamics of property rights. How are these rights created, how are they transferred from one holder to another, and how are they terminated? This is the topic of Sect. 5.7.

A final question, to be answered in Sect. 5.8, is how property law will develop, in particular, in light of further integration within the European Union.

5.2 Why Property Rights?

We are all accustomed to the idea that it is possible to have exclusive rights on objects. There seems to be nothing strange in the fact that someone owns a book and can prevent everyone else from reading it. And still, if one comes to think of it, it is less obvious than it seems at first sight. Why should there be property rights at all? Would it not be better if everyone were allowed to use everything?

Freedom of Ownership Property rights actually facilitate the free circulation of goods by enabling these goods to change owners. A free market economy functions on the basis of what is known as the freedom of ownership. In such a system, every individual is free to acquire and dispose of, i.e. alienate, ownership. The existence of property rights therefore ensures the free circulation of goods. Property law firmly establishes the presumption that all objects and things are freely transferable

unless explicitly prohibited. In other systems, like a socialist economy, this is not the case and property law plays a different role: there, some forms of ownership—for instance, the ownership of land and of means of production such as factories—are communal and therefore shared between the people or between a group of people.

> After the fall of the Berlin wall and the removal of the Iron Curtain at the end of the 1980s and the beginning of the 1990s, former socialist countries had to change their system of property law from shared or communal ownership to a free market economy based on freedom of ownership. This change did not only concern movable things, but also land, which previously also had been held by a community of people. Transition to a free ownership regime was not always without problems, especially not since most people were accustomed to sharing objects, in particular land. Sometimes it is held that the incentive to own individually needed to grow first.

Tragedy of the Commons Economic theory also gives us a good indication as to why there are property rights and therefore also why there is property law. A good illustration of why it is good to allow ownership of material objects, as a primary property right, is offered by the "tragedy of the commons."

> The tragedy of the commons concerns an observation of what can go wrong with herders sharing a common parcel of land, on which they are each entitled to let their sheep graze. It is in each herder's interest to put as many sheep as possible onto the land, even if the quality of the commons is thereby temporarily or permanently damaged as a result of overgrazing. The herder receives all of the benefits from the sheep he puts onto the land, while the damage to the commons is shared by the entire group. If all herders make this individually rational economic decision, the commons will be depleted, or even destroyed, to the detriment of all.
>
> It is therefore in the interest of all if fewer sheep are put onto the land, and if the land is assigned to those herders who profit most from it. This can be accomplished by making one person or group of persons the *owner* of the land. The owner of the land is by definition the person who may decide what will happen to the land. If other persons want to use the land, they need permission from the owner.
>
> The herders can then gain rights from the owner, such as a lease of the entitlement, to put their sheep onto the land (a grazing right). Those herders who profit the most from the land will be able and willing to pay the highest price for the grazing right, which means that the rights will end up with those who profit the most from them. The owner will receive the money, but since the owner may be a collective, such as the municipality, or a whole set of herders, this does not have to be detrimental.

Recent examples of the same problematic are overfishing and pollution of the environment. The creation of fishery rights and pollution rights and of a market to trade them may have similar advantages to the introduction of private ownership of land.

5.3 Property Rights in Civil Law and Common Law

There are different kinds of property rights, both on tangibles—e.g., ownership, title to land and to chattels, mortgage, servitudes—and on intangibles—e.g., what are called "intellectual property rights" such as copyright, patents, and trademarks.

In this chapter, intellectual property rights will not be discussed, but even then it is possible to distinguish many different property rights.

Which specific rights exist differs from one legal system to another, and for that reason it makes little sense to provide a list of "all" property rights. However, it is possible to divide property rights into subcategories:

- primary property rights, as for example the right of ownership;
- secondary property rights to use;
- secondary property security rights; and
- secondary rights to acquire a property right.

Primary property rights are discussed in Sect. 5.4; secondary property rights are the topic of Sect. 5.5.

In property law, there is a major divide between continental European systems, the civil law systems, and the law of England and Wales, the common law. Civil law systems are dealt with in Sect. 5.3.1, while common law property law will be dealt with in Sects. 5.3.2 and 5.3.3.

5.3.1 Civil Law Property Law

5.3.1.1 Ownership, Possession, and Detentorship

In the civil law tradition, a distinction is made between ownership, possession, and detentorship of a good.

Ownership Ownership is a property right that a person has in respect to some object. This is an immaterial relation between the person and the object, without the need for any physical equivalent.

> For instance, Jean can own a book even if he lent the book to Louise, or if the book was stolen from him.

Possession Possession is not the same as ownership; it is a factual relation between a person and an object. A person who possesses an object exercises factual control over this object. Usually, ownership and possession coincide so that the owner is also the possessor of a thing.

> An example would be the person who has bought a good and has received it from the seller. Normally he has also become the owner – possession and ownership usually go together – but this does not have to be so. If the seller was not the owner, it may be the case that the buyer did not become the owner either. However, the buyer does control the good and therefore he is the possessor of the good (in good faith), even though he has not become the owner.
>
> Another example of a possessor who is not the owner is a thief. The thief has factual control over what he stole. But theft is not a way to obtain ownership, and therefore the thief is merely the possessor (in bad faith), but not the owner.

Detentorship Possession must be distinguished from *detentorship*. A detentor also exercises factual control over a good but not on behalf of himself; he recognizes the right of the owner. This difference is relevant in respect to the possibilities to retrieve an object if it has been taken. The possessor can generally retrieve an object with a possessory action, but a detentor cannot.

Examples of *detention* are when a person has borrowed or leased a good.

5.3.1.2 Away from the Feudal System

Civil law systems share a basis in *Roman law*. This basis can be found throughout the system of property law, from the classification of objects in land and goods to the rights that can exist in respect of these objects and the way in which these rights are created, transferred, and terminated.

After the fall of the Roman Empire, continental Europe fell under the influence of Germanic law. Germanic law was tribal law, very different from the highly systematized and centrally organized Roman law. It was very fragmented in nature, and each local lord (of a tribe) used his own version. However, what united the Germanic tribes was their system of landholding. Under influence of this Germanic tribal law a feudal system came into existence.

Feudal System A feudal system is not only a system of government but also a system of property law (or better, of landholding). In this system, a Lord (such as a King) grants feudal rights, known as a fee, to a vassal. A vassal might grant a further fee from his own fee to a subvassal, thereby creating a pyramid of landholding.

In this feudal system, property rights and personal rights (or better, duties) were closely interwoven. These rights on the land were accompanied by duties of the vassal towards his lord. A fee that was held by a vassal was, on one hand, a kind of property right on the land and at the same time included the duties that the vassal had towards his lord.

To state that a fee was a combination of a property right and a set of duties is in a sense an anachronism. In the Germanic system, in which feudality was grounded, the distinction between absolute property rights and relative personal rights did not exist. Only in retrospect can we say that a fee contained both what we now call a property right and personal duties.

It may be interesting to realize that the distinction between property rights and personal rights was already made in Roman law. However, knowledge of Roman law was lost under the influence of the Germans who had invaded much of continental Europe, and was only rediscovered in the twelfth century (see Sect. 1.4).

It was not always clear what exactly the duty of a vassal on the land was. In fact, especially towards the end of the eighteenth century, many vassals were unfamiliar with their rights and duties. The peasants, who were at the very bottom of the feudal pyramid of landholding, complained that they were placed under unfair burdens and often only the landlords held documentation of the obligations of the peasants, such as the duty to provide one-tenth of their harvest. These claims were part of the

books of grievances or *cahiers de doléances* that the peasants brought with them when they stormed the *Bastille* in Paris in 1789 starting the French Revolution.

French Revolution The French Revolution meant a change of the system of landholding. On 11 August 1789, the feudal system was abolished, and only in 1804 was it replaced by a unitary system of property law in the newly made French Civil Code. This Code was an antifeudal document that abolished, for example, all positive duties in property law.

> The peasants had been under positive duties such as the duty to give up parts of their harvest.

Moreover, property rights that were previously associated with the feudal system did not reappear in the Civil Code.

The *German Civil Code* of 1 January 1900 makes an even stronger antifeudal statement. It strictly separates the law of property from the law of obligations and explicitly states that property law must be an autonomous field of private law.

5.3.1.3 Ownership

Unitary System Civil law property systems are unitary: there is one system of property law that applies to land and goods alike. A unitary system means that the right of ownership is the same right of ownership regardless of whether it is held on a car or on a piece of land.

> This type of system has been in existence since the French Revolution, which caused the abolition of the feudal system of landholding on the continent. Napoleon Bonaparte, who issued the drafting of a civil code for his empire, wanted one single legal system for all objects. His example was followed in the rest of continental Europe.

Definitions of Ownership Primary property rights are the most comprehensive property rights available in a legal system. In civil law systems that have a unitary system of property law, there is one such right (on tangibles), and that is the right of ownership. Although the right of ownership is defined differently by the various civil law systems, these systems share the idea that the right of ownership is the most comprehensive right.

Art. 544 of the French Civil Code provides the oldest definition of ownership, which is still valid, stating:

> Ownership is the right to enjoy and dispose of things in the most complete manner, provided they are not used in a way prohibited by statutes or regulations.

Paragraph 903 of the German Civil Code states:

> The owner of a corporeal object can, when this does not interfere with the law or other rights of third parties, do with the object what he wishes and exclude others from interfering. The owner of an animal must, in the exercise of his powers, obey the special provisions for the protection of animals.

Finally, Art. 5:1 of the Dutch Civil Code states:

(1) Ownership is the most extensive right which a person can have in a corporeal object.
(2) To the exclusion of all others, the owner is free to use the object provided that this use does not violate the rights of others and that it respects the limitations based upon statutory rules and rules of unwritten law.
(3) Without prejudice to the rights of others, the owner of the object becomes owner of the fruits the object produces, once separated.

Objects of Ownership There are, however, also differences between the systems. The French definition of ownership extends to things (*biens*), which includes not only corporeal objects but also incorporeal objects, such as claims. It is therefore possible to own a claim under French law.

Suppose that A damaged B's car in a car accident, and that A is liable for damages amounting to €2000 on the basis of tort law. B then has a claim against A for the amount of €2000. In French law, B would be the owner of this right.

The German and Dutch definitions restrict the concept of ownership to corporeal objects; ownership of a claim is therefore impossible under German or Dutch laws.

Therefore, according to German and Dutch law, B would *have* a claim against A, but would not *own* this right.

Vindication Primary property rights are absolute rights, which means that they can (potentially) be invoked against everyone. Because they are also the most comprehensive rights, an owner can use his right against everyone else. Among others, this means that the owner of a good can vindicate this good. Vindication is a legal action in the civil law tradition by means of which a right holder can reclaim possession of the object of his right.

For example, the owner of a stolen bike can reclaim the power over his bike from a thief by way of vindication.

One Right of Ownership In the civil law tradition, there can be only one right of ownership in respect to an object. If one person holds the right of ownership of a good, then all other persons are not owners. Ownership is therefore a matter of all or nothing, not a matter of degree as it is in common law where different persons can have different titles to a good.

Co-ownership The single right of ownership can be held by several persons together. In that case, we speak about "co-ownership." Notice that co-ownership is not an exception to the rule that there can be only one right of ownership on an object. Co-ownership is about more than one person holding this single right.

Xavier holds a right of ownership to a book. He decides to sell the book to René and Maria, who intend to share the book and who each pay half of the purchase price. René and Maria now share the right of ownership between them. They are co-owners, meaning that each of them is entitled to the full ownership of the book. Between them, there is no inequality and hence there can be no competition as to who has a better right.

Another example of co-ownership would be if René and Maria marry and decide to share everything they have. Also then they become entitled to the book or even the house that they live in.

5.3.2 Common Law Property Law

The unitary system of ownership, according to which the "same" ownership applies to both immovable and movable objects, distinguishes the civil law tradition from the common law tradition that exists in England and Wales. The common law system, as it is applied in England and Wales, comprises two subsystems: common law in the narrow sense and equity. Both have their own version(s) of property rights. In this section, the property law of common law in the narrow sense is discussed. Property law in equity is discussed in Sect. 5.3.3.

Fragmented System The common law is the system of customary law that has developed since the Battle of Hastings in 1066. It has two kinds of property law, one for land, land law, and another for "what is not land," personal property law. This division essentially follows the distinction between immovable objects (land) and movable objects (chattels or goods). It is the reason why the common law system of property law is called "fragmented."

The common law of property and the origin of common law are closely related, as William the Conqueror claimed all land in England for himself upon his victory in 1066. From that moment on, all persons held land from the Crown instead of entirely for themselves. Personal property law, i.e. the law relating to movable objects (goods), did not become relevant until the industrial revolution, when movable objects also became of value. (See also Sect. 1.3.1)

5.3.2.1 Land Law

Under the rules of common law, the King is the owner of all land; all others hold land from the King in tenure. This is a feudal system of landholding. Under this system, the King could originally determine the content of the right he gave to others, especially the obligations that right holders had to undertake in return for this right to the land.

Because the feudal system was modernized in the course of time, there was no need to overthrow it, as occurred on the continent after the French Revolution. English *land law* is therefore still a feudal system with its own terminology that has developed and been standardized over time.

Scots law also used a similar feudal system, until the Scottish parliament passed the Abolition of Feudal Tenure Act 2000, terminating all feudal rights in 2004.

One of the most recent modernizations of English land law was the Law of Property Act of 1925. With this Act, the legislature sought to limit and standardise the available property rights in respect to land. After this Act, only two types of

feudal rights on land remained—"estates" in English legal terminology—which a person can have *at common law*:

- the fee simple absolute in possession, also known as *freehold*, and
- the fee for a term of years, also known as *leasehold*.

Fee Simple The most extensive right a person can have is a fee simple absolute in possession or, in short, *fee simple*. The fee simple entitles the holder to exclusive possession for an unlimited duration of time.

Term of Years From the fee simple, the holder can derive a secondary property right in the form of a fee for a term of years or, in short, a *term of years* or *leasehold*, granting exclusive possession to someone else for a limited duration of time.

> For instance, X has a fee simple of a piece of land with a house on it. She can grant a term of five years on the land with the house to Y. Y will be entitled to exclusive possession of the house, which will give her the right to live in it. For the duration of the term of years X has lost exclusive possession and can therefore not enter the land without Y's permission. After the five years have passed, Y's fee will have ended, but X's fee (which is for an (almost) unlimited time) still continues. This means X regains exclusive possession of the house.

5.3.2.2 Personal Property Law

The feudal estates of freehold and leasehold do not apply to *chattels* (by and large, movable objects). There is a newer system of property law, personal property law, that applies to chattels (goods) and *choses in action* (among others, claims).

> In English personal property law goods are known as *chattels*, after the word "cattle."

Title In personal property law, the primary right is called "title." Title, short for "entitlement," is the right of exclusive possession to a chattel. It is the most extensive entitlement to a chattel a person can have.

> If Thomas holds title to a book, he, and he alone (exclusivity), is entitled to control what happens to the book.

There is a complication, however, and this has to do with the so-called *relativity of title*. Relativity of title means that it is possible that more than one person is entitled to the same chattel. If several persons who are all entitled to the same good all claim possession over the good, the person with the stronger entitlement will receive possession. The comparison between two titles is always relative: the one title is stronger than the other. However, the title that wins out in one competition may lose in another competition. It is possible that another person with a still better right might come along and claim possession over the current possessor.

> Suppose that Thomas holds title to a book, but that Andy claims to have a better title. In fact, Andy claims and is able to prove that Thomas borrowed the book from him. As a result of the evidence Andy will have a better title than Thomas.

Suppose, moreover, that Andy himself had borrowed the book from his sister Susan. Susan will therefore hold a better title than Andy. However, as long as Susan doesn't claim her title, Andy can continue with possession of the book.

This is different in the continental system, according to which only one right of ownership can exist on a good. There is therefore no relativity of title in civil law systems.

Let us have another look at the case of Thomas, Andy and Susan, to see how that would be analyzed under a civil law system. Andy borrowed the book from Susan. This leaves Susan as the owner of the book, and makes Thomas into a detentor of the book. Thomas has no right to the book itself, but a personal right against Susan to use the book. Susan cannot vindicate the book from Andy on the basis of her ownership as long as Andy has this personal right against her. But a new owner (if Susan sold the book) might vindicate the book from Andy, since Andy's personal right only can be invoked against Susan.
Thomas is also a detentor, this time based on his personal right against Andy. Andy cannot claim the book from Thomas because of this personal right, but arguably (there are some complications) Susan might vindicate her book from Thoman, since Susan still owns the book and Thomas only has a right against Andy, which cannot be invoked against Susan.

5.3.3 Equity

The rules of common law are very strict and sometimes lead to unfair results. To avoid some of these strict and unfair results, a second subsystem of law developed, known as equity (see also Sect. 1.3.3). The origin of equity is also closely related to property law.

One obligation that might be attached to landholding was to render military service to the King as a knight and to join the King on a crusade to the Holy Land. When a knight, holding the right to land with a duty to provide military service, would join the King on a crusade, he would leave his land behind unprotected. The strict rules of common law did not allow women or children to stand before a court to defend the property rights over the land. Therefore, the knight would transfer his land to a trusted friend who would take an oath to protect the women and children on the land and act in court as necessary.

However, the friend did not always behave as a friend, and sometimes he evicted the women and children from the land. These women and children would petition the King, who would ask his advisor, the Lord Chancellor, for advice. The Chancellor would advise to grant a remedy to the women and children, recognizing their entitlement to the land. However, this recognition occurred in the Court of the King and not in the courts of common law. In this way, a subsystem of law came into being, known as equity, after the justice done by the Lord Chancellor and the King to correct the harsh application of the rules of common law.

Trust Moreover, this is the origin of trust as an institution in common law systems. If there is a *trust*, management powers and enjoyment rights relating to property are separated and divided between a manager (trustee) and one or more beneficiaries (beneficiary owners).

Other property rights on land exist *in equity*. In fact, in equity, the courts can authorize new types of property rights. In order to have an overview of English property law, one must therefore look at both common law and equity.

5.4 Primary Rights to Use and for Security

5.4.1 Primary Rights to Use and Its Limitations

Generally, the right of ownership (in civil law) or the fee simple or title (in English law) is the most extensive right to use a thing or an object. It grants the holder of the right the most extensive entitlement to use it.

Limitations Of course, this does not mean that the holder may do everything; there are limitations. For instance, the holder of a primary right of a monument cannot alter it without permission from the (local) government: monuments are normally under control of the State to ensure that they keep their valuable state. Other examples are that the purpose for which a building is used may not be changed from commercial to residential (to change a building from a shop into an apartment building) without a special permit and that the person entitled to a piece of land can only build on it with a building permit.

> These are all examples of how private law rights are limited by rules of public law. However, the permission to (ab)use an object one owns may be limited on the basis of private law too. Around 1900, a discussion raged in French legal doctrine about what an owner is allowed to do with his properties. The liberal French author on property law Demolombe argued that the owner could do with his object of ownership whatever he wished. This would include that the owner of a famous painting, say a Degas, would be permitted to destroy it by setting it on fire. Although other liberal authors agreed with Demolombe at that time, disagreement is certainly possible and this raises the question about the scope of the ownership of things that are of value not only to the holder, but also to the rest of society.

5.4.2 Primary Right for Security Purposes

Primary rights are also used for security purposes. To understand what this means, it is first necessary to provide some background information about how competing claims against the same debtor function.

Paritas Creditorum Suppose that A owns €1,000 to B and €3,000 to C. If everything goes well, A will pay both of his creditors. However, if A does not have enough money to pay both B and C, what will happen then? If A pays one creditor and lacks the money to pay the other, the other has bad luck. He still holds a claim against A but will probably not receive his money. However, as long as there still is some money, the claims of B and C are equal in rank. It is, for instance, not the case

that the older claim prevails over the younger one. In Latin this is called *paritas creditorum*: equality of creditors.

> It is the function of the legal institution of insolvency to secure a correct division of money if a debtor cannot pay all of his debts.

A consequence of this principle of equality is that the chance that a creditor will receive his money depends on the claims of other creditors. Most creditors do not find that a comfortable situation and may therefore be unwilling to allow credit. Because credit strongly facilitates commercial transactions, and the unwillingness to allow credit hampers these transactions, the law recognizes the phenomenon of security.

Personal Security Security comes in two forms. One is *personal security*, when one person undertakes the liability for someone else's debts.

> An example would be that the parents of a student promise the landlord of the student to pay the rent if the student does not pay himself.

Property Security The other form is *real* or *property security*, when the goods of a person, usually of the debtor himself, can be sold off to pay the debt. Well-known forms of property security are mortgage (hypothec) and pledge, which will be discussed later as secondary security rights. However, in many jurisdictions, primary rights can be used for security reasons too.

Reservation There are two ways in which a primary right can be used for security. First, in a situation of a contract of sale, the seller may reserve or retain his primary right until the payment of the purchase price. This is known as a reservation of ownership (civil law) or retention of title (common law). Such a reservation or retention is a very effective security right. It is created by a clause in the contract of sale whereby the seller suspends the transfer of the primary right until the condition, i.e. the payment of the purchase price, is fulfilled.

> If the buyer does not pay, the seller can use his right to claim his property back. Because the seller has retained his property right, the object cannot be used to satisfy other creditors.

Fiducia Cum Creditore A second technique, used in a different situation, is to transfer the right of ownership for security purposes. This technique, in civil law known as a transfer of ownership for security purposes or *fiducia cum creditore* (as it was called in Roman law), uses the primary right as the most valuable right to secure the payment of a claim. It transfers the right of ownership under a condition of resolution, meaning that the transfer is effective until a condition—usually payment of the outstanding claim for repayment—is fulfilled. The value of the object under ownership will thus guarantee the fulfillment of the obligation it was meant to secure.

For instance, the owner of a pub transfers ownership of the pub's inventory to the brewer from which she draws her beer. The beer is sold to her on credit, and the ownership of the inventory functions as a security for the debt of the pub holder. If she does not pay, the brewery can sell the inventory of the pub. If the relation between the pub holder and the brewery ends, and all the bills of the brewer have been paid, the inventory becomes the property of the pub holder again.

5.5 Secondary Property Rights

All property rights that are not primary rights are secondary (or lesser) rights. They comprise permissions and/or competences (powers) that would normally belong to the holder of the primary right but that can be exercised by the holder of the secondary right instead of, or next to, the holder of the primary right.

Usufruct The best example is the right of *usufruct*. A right of usufruct is the right to use and enjoy an object that is owned by someone else. The secondary right of usufruct therefore comprises the permission to use and enjoy the object of the owner, who no longer holds this permission himself. The owner now holds "bare ownership," signaling that he has given away his permission to use and enjoy the object.

Secondary property rights are traditionally divided into secondary rights to use and secondary security rights. These two categories of rights stem from Roman law. More recently, they have been complemented by a third category of secondary rights, which are known as "secondary rights to acquire another legal position."

These last-mentioned rights are very technical and will therefore not be discussed here.

5.5.1 Secondary Rights to Use

Secondary rights to use are property rights that entitle the holder to use the object for a limited duration of time. Generally, there are two categories. Secondary rights to use for a shorter period tend to be more extensive in content.

An example is the already mentioned civil law right of usufruct. This secondary right entitles a person to use an object as if he were the owner, usually for the duration of his life. For example, it can be the right to have a painting, owned by someone else, in your house for the remainder of your life. This situation is usually created upon death of one spouse in a family to allow the longest living spouse to enjoy the painting without any heir, children or stepchildren interfering. The holder of a right of usufruct can continue to use the object of his right even if the owner of the good sells it. Because the usufruct rests on the object and is not a personal right against the person who granted it, the right "follows" the object (*droit de suite*).

Secondary rights to use for a longer period of time generally have a less extensive content.

Servitude An example is the right of servitude. A right of servitude can be created on one piece of land for the benefit of another piece of land. A typical example is the right of way, which allows the owner of the one piece of land to walk (or drive) over the other piece of land, usually that of the neighbor. Such a right is, for example, useful to reach a nearby road, or to ensure an escape route in case of fire.

The right of servitude limits the ownership of the land on which the servitude runs. The owner is normally allowed to exclude everyone else from his land, but now agrees to no longer exclude the right holder of the servitude when he or she is exercising his or her right.

The right of servitude is created on the land. The effect of this is that when the right of ownership of the land is sold and transferred to someone else, the new owner is still bound by the right of servitude.

5.5.2 Secondary Security Rights

Secondary security rights are created to secure the payment of a claim. They are usually created on an object on which the debtor of a claim has a primary right.

> The best example of a secondary security right is a right of *hypothec* (or, in the common law, of *mortgage*). This is a secondary security right that an owner of a house (or land) grants to a bank in exchange for financing the acquisition of the house (or land).

There are two main types of secondary security rights:

1. the right of pledge, which can be created on most movable objects (for instance, jewelry or cars) and on particular kinds of rights;
2. the right of hypothec (or mortgage), which can be created on immovable objects (land and all that is attached to it, like houses) and on some special movable objects (e.g., ships or airplanes).

The security right is held by the creditor of the claim, usually a bank, and gives the holder the power to take possession of and sell the object, to transfer the primary property right of the debtor to the new owner, and to satisfy the debt from the proceeds. Any surplus must be paid back to the debtor.

> For instance, Joan bought a house and for that purpose borrowed €150,000 from the bank. As security for this loan she creates a right of hypothec on her house, in favor of the bank. If Joan does not repay the money in time, the bank may evict Joan from the house, take possession of the house, sell it at an auction and satisfy the outstanding debt by means of the proceeds.
>
> Suppose that Joan still owes €100,000 to the bank and that her house brings in €140,000 at the auction. Then the bank can take €100,000 from the proceeds and must return €40,000 to Joan. If the house only brings in €80,000, Joan must still pay the bank €20,000.

Priority Secondary security rights also give the holder of the right priority in insolvency. Holders of personal rights will be treated equally in insolvency: *paritas creditorum*. However, holders with a secondary right for security may claim their money before the creditors who hold only personal rights.

> Suppose that Joan not only owed €100,000 to the bank but also €50,000 to a friend. If there is no hypothec to secure any of these loans and the house is sold to satisfy the creditors, the bank will receive 2/3rds of the proceeds, and the friend 1/3, proportional to the claims they had against Joan (*paritas creditorum*).
>
> However, if the bank has a right of hypothec, the proceeds of the house will first be used to pay the bank. If the house brings in €80,000 the bank will receive all that money and Joan's friend will receive nothing. If the house brings in €140,000 the bank will receive €100,000 and the friend €40,000. (This example assumes that there are no other creditors and that Joan has no money, but only the house).

5.6 Principles of Property Law

Property law systems in Europe differ widely, especially at the level of detailed rules. However, all systems of property law must deal with the same issues, and they approach these issues similarly. This approach is based on principles and rules of property law, which will be dealt with in this section.

5.6.1 The Principle of *Numerus Clausus*

Property rights exist in land or goods and are not merely directed toward one or more concrete persons; they can, in principle, be invoked against everyone. For this reason, it is undesirable that individual persons (including "legal persons" such as companies with limited liability) can make up such strong rights by themselves, if only because they would thereby bind other persons who were not involved in creating these property rights.

> Imagine that A could create a property right on his land, with the content that everyone should pay the owner of this piece of land an annual amount of €50. This would make A rich very quickly indeed.

Therefore, only a limited number (*numerus clausus*) of property rights are recognized. The property rights in this exhaustive list are the only types of property rights that persons can create.

> The *numerus clausus* of property law should be seen in contrast with the freedom of contract, which means that persons can, through a contract, create (almost) any obligations they want. This larger freedom in the contractual sphere can be explained by the fact that contracts normally only bind the contracting parties.

Note that the *numerus clausus* only concerns the *types* of property rights that can be created. It is not a limitation on the *number* of property rights of these kinds that can be created.

The owner of a piece of land can in principle create as many rights of servitude on this land as he wants. It is also possible to grant more than one hypothec to different creditors on one immovable object. Sometimes, however, the nature of a kind of property right brings limitations with it. It seems, for instance, senseless to have more than one usufruct on a car.

The principle of *numerus clausus* therefore means that parties themselves are restricted in their freedom to create new types of property rights.

The task to designate which property rights are possible is in Germany assigned to the legislature. In English law, this authority resides with the Supreme Court (formerly: House of Lords). In French law there is a mixed situation where the legislature and the Courts share the authority to recognize new types of property rights.

5.6.2 The Principle of Specificity

A second principle of property law is the principle of specificity. A property right is a right on a good or on land, and it should be clear in respect of precisely which good or land the property right is created. It is, for instance, not possible that a jeweler can own "four golden rings" without it being clear precisely which rings are owned by the jeweler.

The importance of the principle of specificity becomes clear if one considers what would happen if this principle were not respected. Suppose that the jeweler needs money and wants to create a right of pledge on his golden rings. In order to do so, he must give the rings to the holder of the right of pledge. If it is unclear which rings the jeweler owns, it is not possible to comply with this condition for creating a right of pledge. If the jeweler hands in four random golden rings, the creditor might end up with rings that belong to a third party, who has nothing to do with either the jeweler or the holder of the right of pledge.

A consequence of the principle of specificity is that so-called fungible objects, which occur in masses, such as grain, sand, and also money, can generally not be the object of individual property rights if they are mixed with other objects of the same kind.

If Jane brings money to the bank to put it on her savings account, she loses ownership of this money, because in the bank it is mixed with money from other persons and can no longer be identified as the money of Jane. Although Jane has an individual bank account, this is merely an administrative status representing Jane's rights on the money in the bank. Jane only has a claim against the bank to return to her the same amount of money (plus possible interest) that she deposited in the bank.

A practical consequence is that if the bank becomes insolvent, Jane has to compete with all other creditors for a share in the remaining money. She cannot take out "her" money, because there is no money that belongs specifically to her.

Droit de Suite The principle of specificity is also important for the *droit de suite*, the phenomenon that property rights follow the objects on which they rest and can be invoked against every possible holder of the object (see Sect. 5.1.1). If it is unclear on which object the property right rests, the *droit de suite* would be impossible.

Bank A offers all sorts of special investments. Some of these investments, including those in the SJ Foundation, have special certificates. For each 100,000 euros, the investor will receive a certificate granting the right to have one vote in appointing the director of the foundation. Bank A keeps around 1,000 certificates for its clients.

Suppose that bank A is in financial turmoil and is declared bankrupt. The clients for which Bank A was holding the certificates seek to vindicate, that is reclaim possession of, the certificates. However, as there is no administrative document to show which certificate specifically belongs to which client, they cannot do so; their ownership is lost.

Specificity is, finally, also important because property rights end if the things or objects on which they rest cease to exist. This only makes sense if property rights have specific objects.

Pressure on the Principle The principle of specificity is under pressure nowadays because of the development of new objects of property law. The reason is that immaterial "things," such as money on bank accounts, claims, and virtual objects in online computer games, become more and more important and valuable. As a consequence, it is useful to allow property rights on them, but—as can easily be understood—immaterial things are less easy to identify than material objects. As a consequence, it becomes increasingly burdensome, or even impossible, to identify exactly the object in which property rights are vested.

5.6.3 The Principle of Publicity

If property rights potentially affect everyone, it is important that everyone can know who has which property right.

If you want to buy a house, it is essential to know whether there is a hypothec (or mortgage) on the house. The holder of the hypothec can, under certain circumstances, sell off the house to satisfy his claim from the proceeds. Because of the *droit de suite*, this property right can be invoked against anybody holding the house, and therefore also against new owners. If this is the house you recently bought, and if the debts for which the house is sold are not your own debts, it is rather painful.

Therefore, property rights should, in principle, be publicly knowable. The way in which this demand for publicity is satisfied differs for real estate (land and what is built upon it) and movables.

5.6.3.1 Land

In respect to land, publicity is realized through a land registry.

When Adam sells his land to Beatrice every legal system would require an authentic deed, drawn up by a notary or other official, that contains the agreement of transfer between the parties. Let us assume that in this case the deed is drawn up by the notary Clovis and sent in for registration.

Negative Systems There are generally two types of registration systems. On one hand, there are registration systems that operate on the basis of a simple registration of *deeds*, i.e. official documents created by a notary.

When the deed drawn up by the notary Clovis is received by a deeds registry, a date and timestamp is placed on the deed. The registrar sees that the deed was drawn up by an official notary who has the capacity to draw up deeds. The deed is then registered under the heading of the piece of land it concerns.

Such *cadastre* systems are called negative systems because the registrar registers the deed with only a marginal check of the formal validity of the contents. They are used in French law (*cadastre*) and in Dutch law (*kadaster*).

Positive Systems There are also "title registry systems." They are known as positive systems because the registrar actively checks the content of the deeds offered to him. After this thorough check, the registrar updates the registry, which contains not a set of deeds but exact information about who holds which property law entitlement (title) to which piece of land.

When the deed drawn up by the notary Clovis is received by a title registry, a date and timestamp is placed on the deed and the registrar starts his or her investigations into the validity of the deed. He or she will check the parties, the piece of land concerned and retrace the steps made by the notary Clovis. When the check is completed (this can take up to three months), the results of the deed are registered: Beatrice will be identified as the new owner.

This positive system of land registry is used in German law (*Grundbuch*) and in English law (Land Registry).

In English law, registration has only become mandatory in the last years. Therefore registration of land will only occur henceforth when land is transferred between parties or passed upon inheritance. A full registration system will result over time.

5.6.3.2 Movable Objects

There are many movable objects, and it is impossible and undesirable to maintain a register that states for every movable object (e.g., for every spoon and every fork in your kitchen) who has which property right in it. Happily, movable objects are most of the time—but certainly not always—owned by the person who actually has them in his possession. Therefore, when a person holds factual control over an object, this is a signal to the world that this person is exercising a property right. In the case of movable objects, publicity of ownership takes the form of possession.

When a property right in a movable object is transferred, this is usually also done by transfer of possession. In that way, it is made public that the property relations have changed.

There are some complications here, depending on whether a legal system works with a consensual or with a tradition system. More details will be presented in Sect. 5.7.2.1.

5.6.4 The *Nemo Dat* Rule

The *nemo dat* rule holds that nobody can transfer a property right that he did not have himself in the first place. The name of this principle is an abbreviation from the longer Latin phrase *nemo dat quod non habet* (nobody can give what he does not have).

A person who owns a thing can transfer the full ownership of it, but the holder of a mere right of usufruct may be able to transfer the right of usufruct but cannot transfer the full ownership of the object.

Competence to Dispose The *nemo dat* rule is implemented in the requirement that a person transferring a property right must have the competence to dispose of that right. When the competence to dispose is lacking, this person cannot transfer the right to someone else.

Although the competence to dispose is closely connected to the property right itself, they are not identical. The normal situation is that the holder of a property right is competent to dispose of it and nobody else. However, sometimes the holder lacks this competence, for instance if he is in a state of insolvency. Moreover, sometimes someone other than the right holder is (also) competent to dispose of a right, such as the holder of a right of pledge who can transfer ownership of the object under pledge if he has to sell the object for the payment of a debt.

> If Bank B holds a pledge on Adam's car, and Adam defaults on his payments, the bank will have the right to take possession of the car and sell and transfer the car to someone else. When this happens, Adam will lose his competence to dispose to the bank. Bank B will now be able to dispose of the (ownership of the) car and sell and transfer it to someone else.

5.6.5 *Prior Tempore* Rule

The rule *prior tempore*, *potior iure* (earlier in time, more powerful as a right), which also stems from Roman law, determines that older property rights trump newer rights. This is very important in case there is a conflict between several property rights, such as when there is more than one hypothec on one piece of land. Then the holder of the older hypothec will get paid first from the proceeds of the land, and the holder of the second right comes after the first hypothec holder (but before the creditors who do not have a property right on the land). The same holds for the right of pledge.

> Adam has granted a right of pledge on his car to Bank B. However, as it turns out, he has also granted another right of pledge on that same car to Bank C. This creates a problem now that Adam can no longer pay either bank. Bank B and Bank C each claims to have priority over other creditors and seeks to take possession and sell and transfer the car to satisfy their claims with the proceeds of sale. However, only one of the banks will be allowed to do so.

Property law solves this problem with the *prior tempore* rule. The creditor with the oldest property right has priority over the creditor with the younger right. Bank B holds the oldest property right (pledge) and may therefore exercise the right of pledge. Bank C must wait to see if there is anything left of the proceeds of sale after Bank B has satisfied its claim.

> It should be noted that with regard to these left-over proceeds, Bank C has priority over other creditors who do not have a security right. For this reason it makes sense for a creditor to accept a second pledge (or hypothec, for that matter) on an object.

The *prior tempore* rule is specific to property law, as personal rights generally compete against each other with an equal status.

5.6.6 Specific Protection

Property rights enjoy a special form of protection by the law. This special protection takes the form of specific enforceability, meaning that the duties that follow from the right can be enforced as such.

At first sight, it may seem obvious that legal duties can be enforced, but this is not always the case. Often, if someone does not fulfill his duties, the person to whom the duty was owed can receive monetary compensation for the damages but cannot demand that the duty be fulfilled.

> Tort law is a good illustration of this phenomenon. If someone damages someone else's objects, the victim can claim monetary compensation, but cannot necessarily require that the damage be undone, or that the act of damaging stops. For example, a water leakage from the upstairs apartment may create damage to the apartment below. A successful action in tort allows a person to claim damages, but not automatically to stop the water flow.
>
> In the case of contractual default, the same is the case: the creditor can claim damages, but not necessarily specific performance. There are, after all, situations where performance is difficult or where the debtor really does not want to perform. Think for instance of a soccer professional who really does not want to play. Contract law can generally only give monetary incentive to perform. A debtor who really does not want to perform can generally not be forced to do so other than through the payment of money.

Vindication In the civil law tradition, each property right generally has its own action protecting it. The right of ownership, for instance, is protected by the action that is known as *vindication*. Vindication means that the owner is restored in factual power over the object that he owns.

> For example, if a thief stole your bike, vindication means that you can claim the actual bike back from the thief.

An action parallel to vindication is also possible in connection with other property rights that involve the factual power over a good.

> If a thief stole the bike on which you hold a right of usufruct, you can also claim the actual bike back from the thief.

In common law, only rights relating to land are specifically enforceable; rights relating to chattels are enforced through the law of torts under the *tort of conversion*. The tort of conversion generally forces the tortfeasor, in this case the person who interferes with someone else's property right, to choose between paying damages or returning the object or ending the interference with it.

When a thief steals your bike, you may sue the thief in tort and claim damages from him. The thief will then have a choice to pay damages or to return your bike to you.

It should, finally, be noted that property rights are protected not only by property law but also by criminal law. The thief and the person who deliberately destroys someone else's property are liable to be punished.

5.6.7 The Rule of Accessority

The rule of accessority creates an unbreakable link between a property security right and the claim for which the right was created, in the twofold sense that

1. the continued existence of the security right depends on the continued existence of the personal right that it secures, and
2. if the personal right is transferred from the original creditor to a new creditor, the security rights goes with the claim.

This can be illustrated by the sale of a house. Suppose that A buys a house and needs financing for it. The financing will generally be provided for by a bank or some other financial institution. The bank and A will enter into a loan agreement, thereby creating a claim for the repayment of the loan in favor of the bank and against A. This claim is a personal right, which can only be exercised against A. The claim can be strengthened by the creation of a property security right. In case of a house, this will be a right of mortgage (common law) or hypothec (civil law).

The existence of the right of hypothec is connected to the claim of the bank for repayment. When the loan is repaid, the claim will end and the hypothec or mortgage will end too. Moreover, when the claim for repayment is transferred to another bank, the property security right will go with it to the other bank. The hypothec "follows" the claim from the loan contract. See Fig. 5.2.

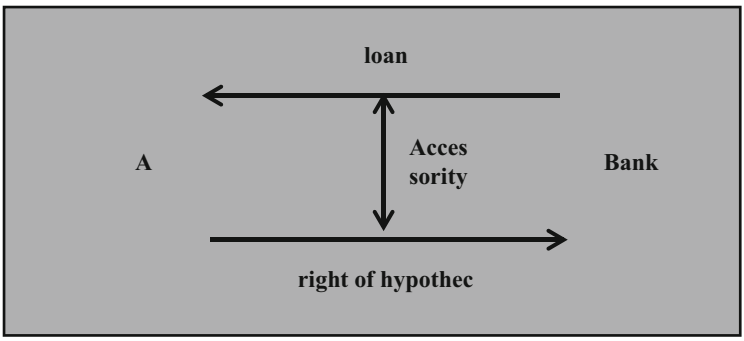

Fig. 5.2 Accessority

5.7 Creation, Transfer, and Termination of Property Rights

A large part of property law provides rules on how property rights can be created, transferred, and terminated. These rules are also known as operative or interface rules, as they determine how property rights behave and how we interact with them.

5.7.1 Creation

All property rights, both primary and secondary rights, must have come into existence at some time. In this chapter, we only discuss some of the ways in which primary property rights can be created.

Occupation A primary property right can originate when an object that previously belonged to no one is found and taken into possession by the finder. This is called *occupation*.

> This may for instance be the case when someone catches fish in open waters, or shoots a wild bird.

Creation A property right can also come into existence when a new object is created out of a previously existing object. When sufficient labor has been invested in the new object, the person who provided the labor will become holder of a primary right over the new object.

> For instance, if someone knits a sweater out of wool, this person becomes the owner of the sweater. However, it is doubtful whether someone who makes a coin out of a piece of gold that belonged to someone else becomes the owner of this coin. In this case, the value of the gold in the coin may be higher than the added value resulting from minting the coin.

Mixing In case of mixing of two or more objects, a new primary right will arise. Depending on the type of mixing, the new primary right will be shared by the parties previously holding primary rights on the objects that mixed or by one single party.

> If money from different persons is collected in a bag, the total amount probably belongs to the original owners together.

Accession However, if land and bricks with different owners are joined to build a house, the owner of the land will become the owner of the house. This happens by operation of the principle of accession: that which belongs to the land becomes part of the land.

Prescription Finally, property right can also be acquired by possession, i.e. the exercise of factual power for oneself, for a long period of time. If after a long period of time the holder of primary right has not objected or taken legal action against the "adverse possession," the possessor will acquire a primary property right in the possessed thing by what is known as prescription. This rule exists to create legal

certainty. It is important that discrepancies between the factual situation (possession) and the official legal situation (the title) do not exist for too long. In the long term, the legal situation is adapted to the factual one. So if A is in possession of a piece of land of B for a long duration of time (say 30 years), A becomes owner of that piece of land and B loses his right of ownership.

When the possessor is in good faith, meaning that he sincerely thought he could exercise a right, the prescription period will generally be shorter then when this is not the case. Possession in good faith can for example occur if someone bought a good from a person whom he rightfully, but mistakenly, took to be the owner. A thief would be a typical example of a possessor in bad faith.

5.7.2 Transfer

5.7.2.1 Transfer and Publicity

If a property right is transferred, two requirements must be met. The easiest one is that it must be clear between the *transferor* (the person who transfers) and the *transferee* (the person to whom it is transferred, also known as *acquirer*) that the former has lost the property right and that the latter has acquired it.

An example in which this demand is not met is the following. A and B agree that B will have the book that now belongs to A. One day B visits A at her home and sees the book lying on the table. B puts the book in his suitcase and takes it home. It is possible that B assumes that he has become the owner of the book, but A knows nothing about it. Such "transfers" are not desirable, and it is unlikely that the law will recognize these events as valid transfers of ownership.

To the extent that only the relation between transferor and transferee is concerned, it would suffice that they both agree that the property right has passed from one to the other. However, the interests of third parties are often involved in the transfer of a property right.

Suppose that A has a claim against C for an amount of €10,000. A agrees with B that from now on, B will have the claim, but they do not say anything to C, who still thinks that she owes money to A. C pays €10,000 to A, but now B claims that C should pay that amount to him.

Another example: A transfers the right to a box with golden rings to B, but the box remains on A's premises. Later a money lender visits A, lends A €2,000 and takes the box with rings as object for a right of pledge. B tells the money lender that he will vindicate the rings, because they belong to him. The money lender fears that he will lose his security right.

To avoid problems like those in these examples, it is desirable that third parties know that a transfer of property right took place. In this connection, the principle of publicity plays a role. According to this principle, it should be known to the public at large who is the holder of a property right. If this is known, problems like the ones

mentioned above are less likely to occur. To make this known, the requirements for the transfer of a right aim to ensure that the effects of the transfer will be known to the public at large or at least to the persons whom it concerns.

In Europe, there are two main ways in which the transfer of property rights can occur. Both systems can be understood from the need to "publish" the transfer, and their difference can be seen as an outflow of different ways to manage the publicity requirement. One is the consensual system; the other is the transfer system. We will discuss both briefly and only in connection with the sale of a material object.

The Consensual System A consensual transfer system merely requires consensus to transfer a property right between the seller and the buyer. This means that the conclusion of the contract of sale will transfer the property right from the transferor to the transferee or acquirer.

> For instance, if a customer buys a loaf of bread in the baker's store, the sales contract makes the customer the owner of the bread immediately. In theory, the customer has already become the owner even before the bread was handed to her. The baker is under an obligation to give the bread to the customer, but the customer is already the owner because of the contract.
>
> More important is the consensual nature of transfer in the following case: A sells his car to B, but will only deliver it tomorrow. During the night, the car is stolen. Will B's insurance have to pay? According to a consensual system, the answer is "yes," because B immediately became the owner of the car, even though he did not actually have possession yet.

The consensual system is used in France, Belgium, and England. However, these countries distinguish between movable and immovable objects. In the case of *movable objects*, the buyer becomes the owner immediately upon conclusion of the contract.

In the case of *immovables*, the property right is also transferred, but this transfer will only have effect between the parties. Only when the contract in the form of a deed—an official document—has been registered will the transfer of the property right also have effect against the rest of the world.

> A sells his house to B, but the registration of the deed still takes a few days. Within this short period, A sells the house for a second time, now to C. The second deed is registered before the deed of the first sale agreement was registered. C has now become owner of the house, because the transfer based on the first sale contract only worked against C after the deed was registered.
>
> Because the sale contract between A and B had immediate effect between these two parties, B could evict A from the house immediately after the sale contract was entered into, even before registration of the deed.

The Tradition System A tradition system requires, besides a contract of sale, a special act to transfer the property right. This property-transferring act, especially concerning movables, was known as *traditio* in Roman law, which is why these systems are called "tradition systems."

Germany and the Netherlands are countries in which a tradition system is in use. England has a tradition system for land and for the transfer of chattels not based on a sale agreement (e.g. barter, which is exchange of goods for other goods or services).

A contract of sale in a tradition system therefore serves as the starting point for the transaction but in itself does not have effect in property law. The contract is known as the *title* for the transfer in these systems.

This title, which is the reason why a property right must be transferred, should not be confused with the title one can have in an object, and which is comparable to (some variant of) ownership.

The title does not necessarily have to be a contract of sale. It can also, for example, be a donation (gift).

Property Agreement In order for the property right to be transferred, the parties must fulfill the requirements imposed by property law. The acts by means of which these requirements are met are usually called property agreements or, more old-fashioned, *real agreements*.

The exact requirements for a property agreement differ between property rights on movable objects and property rights on land. In order to transfer a property right on *movable objects*, property law requires the seller to provide the buyer with factual control, i.e. possession. The transfer of possession occurs on the basis of this property agreement.

The baker who gives the bread to the customer, the car dealer who hands over the car keys to the customer, and the web shop which sends the package to the client therewith perform the property agreement which is necessary for the transfer.

In the case of *immovables*, legal systems require more formalities to be fulfilled. The buyer and seller conclude a contract of sale, which will be the title to the transfer, and also conclude a deed, which is an official document in which the transfer of the property right is dealt with. Depending on the legal system, the deed is drawn up in front of a state official, usually called a notary or notary public, or another official such as a solicitor in English law. The deed will be the property agreement. Finally, for the transfer to have effect, between the parties and to the outside world, the deed will have to be registered in the land registry (publicity).

5.7.2.2 Transfer of Claims

Incorporeal objects can also be transferred. A creditor of a claim may generally transfer his claim against the debtor to another person unless the parties who created the claim have agreed otherwise. When a claim is transferable, the transfer can be brought about through an agreement between the creditor of the claim and the new acquirer. Depending on the legal system, this can occur with or without notification to the debtor of the claim.

If Adam has borrowed money from Beatrice, Beatrice has a claim against Adam for repayment of the money. Beatrice can transfer this right to payment, i.e. the claim, to David. David will now be entitled to receive the payment from Adam.

5.7.3 Termination

Property rights can be created and transferred, but they can also be terminated. There are generally two ways in which a property right can end.

The first possibility is that the object on which the property right rests is destroyed or ceases to exist independently.

Ownership of a car will end when the car is completely destroyed by fire.

Land can stop existing, if, for instance, it is permanently flooded, or when a large meteor hits and destroys the land. Then there is nothing left to own for the land owner, and ownership ends.

Claims can stop existing if the corresponding duty has been fulfilled, or if the claim was waived by the creditor.

The second possibility is that the property right on an object ends, even though the object itself continues to exist. One way in which property rights can cease to exist is when they are *waived* or *abandoned* by the right holder. Abandonment of rights is usually possible for movable objects and claims but not easily for land.

If a fisher who has captured a fish and in that way became owner of the fish, lets the fish go, ownership of the fish is terminated.

If B is under an obligation to pay A €100 and A tells B that he does not have to pay anymore, then the claim of A against B has been waived and has perished.

Property rights can also be terminated by operation of law. This happens, for instance, if the title in a piece of land is lost because of prescription.

If a piece of land belonged to A, but B used the land as if it was his own for a long period (say 30 years or more), and if A did not protest or undertake any legal action, A loses his title to the land. Normally B would gain title.

A right of usufruct usually ends if the holder of this right dies, and a leasehold (a fee for a term of years) ends if the term has passed.

Finally, in most legal systems, a property right can also be terminated by agreement between the parties involved in the right.

If A is the owner of a piece of land, and B is the owner of the neighboring land, who in this capacity enjoys the right of servitude that he may cross A's land, A and B (officially: the owners of the two pieces of land) can end this right of servitude by mutual agreement.

5.8 European Union Property Law

After the overview of property law in the sections above, it is time to look forward to the development of property law. In the European Union, there is an increasing debate on the need to create uniform rules of private law for the European Union's internal market. The starting point of this debate is the assumption that the internal market cannot function properly without common rules of private law, mostly contract law but increasingly also property law.

> Imagine an EU citizen buying objects online from another EU Member State. An important question that needs to be answered is when the buyer receives the primary property right over this object, as the holder of a primary right generally also bears the risk if the object is lost before it arrives. If the primary right is transferred upon conclusion of the contract, as in a consensual transfer system, the risk is with the buyer. If delivery, i.e., the transfer of possession is needed to transfer the primary right as in a tradition system, the risk is with the seller.

The European Commission therefore seeks to investigate possibilities to create common rules for the internal market. However, creating these rules is much more difficult in property law than in contract law. Changes in property law easily threaten to be wholesale instead of piecemeal because changes in one part necessitate changes "everywhere." Moreover, because of the importance of property law to a legal system in general, as the basis for other areas of law such as taxation, succession, marriage, and insolvency, changing these rules is controversial and always politically sensitive.

Even if the political will exists to change property law systems to create uniform rules for the EU's internal market, it will be difficult to decide what would be the best rules. In this respect, mixed legal systems may be of help. Mixed legal systems are legal systems that combine multiple legal traditions in a single legal system. In Europe, a combination of common law and civil law systems can provide interesting insights. Property law scholars therefore often look at the law of Scotland, which combines the English common law (not equity) and the French civil law traditions. Another very important mixed system is South African law, which combines Roman Dutch law (which is unwritten civil law from the seventeenth century brought to South Africa by the Dutch settlers) and English common law (again, not equity). These legal systems may offer inspiration for the further development of common rules for the European Union.

Because there are so few and minor similarities between the European systems at the technical level, any decision for harmonization will result in a requirement for many of the legal systems to change their technical rules of property law. Nonetheless, there are several European initiatives that are worth mentioning. For many years, there has already been a debate on the creation of a European right of hypothec, a secondary property security right on land and houses that could be used to finance the acquisition of land and houses in Member States more easily.

Moreover, a debate is ongoing about the creation of a European security right on movables and claims, which would create a uniform European system that can be enforced throughout the EU.

Finally, EU rules on wills and succession, as well as rules on marital property law, are in development, which should enable international couples to choose the legal system that will be applicable to their marriage or succession.

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Tort Law

6

G.E. van Maanen and Jaap Hage

6.1 The Domain of Tort

Donoghue vs Stevenson, [**1932**] **AC 562**
On August 26, 1928, Mrs. May Donoghue visited a bar in Paisley, Scotland. The owner of the bar poured part of a bottle of ginger beer on top of her ice-cream; her friend poured on the remainder. On doing so, they saw the remains of a snail in a state of decomposition. Mrs. Donoghue later claimed to have contracted gastro-enteritis from drinking the bottle, and therefore she wanted to be compensated financially by Stevenson, who had manufactured the bottle.

This case between Mrs. Donoghue, who allegedly suffered damage from drinking from a bottle that contained spoiled ginger beer, and Stevenson, who produced this bottle, has become a classic of tort law. Tort law deals with cases in which a victim suffered damage and wants someone else to compensate the damage.

Main Principle of Tort Law At first sight, it may seem strange that if people suffer damage, someone else must compensate them. In fact, this would be an exception to the main principle of tort law: *Everyone must in principle bear his own damage*.

That everyone bears his own damage and that therefore nobody else must compensate it is the starting point, the main principle of tort law. One might see the field of tort law as dealing with the question when we must make exceptions to this principle. In this connection, several questions pop up:

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1. Why should the damage that a victim suffered under certain circumstances be shifted to a different person at all?
2. What are the conditions under which a victim's damage must be compensated by another person?
3. If damage is to be compensated, which damage qualifies for compensation?

These three questions will be answered in Sects. 6.2, 6.3–6.6, and 6.7, respectively. But first, two preliminary issues need to be dealt with.

6.1.1 Contract Law and Penal Law

Tort law must be distinguished from both contract law and criminal law. Unlike contract law, tort law deals with situations where there is no preexisting contractual relationship. If such a contractual relationship does exist, compensation of damage is usually dealt with by the law of contract.

Moreover, unlike criminal law, tort law does not aim at punishing wrongful behavior, but seeks for ways to compensate the damage that is often caused by wrongful acts. So tort law differs from criminal law in that it does not focus on punishment but on the compensation of damage, and it differs from contract law in that it does not deal with the damage that results from the nonperformance of contracts.

6.1.2 Tort and Torts

The expression "tort law" suggests that tort law is a homogeneous field of law, with a few rules that regulate compensation for all kinds of damage. To some extent, this suggestion is correct, but not completely. Tort law can be applied to very heterogeneous topics, such as bodily harm, manslaughter, insult, libel, infringement of privacy, trespass on one's property or into one's home, damage to one's goods, violation of copyright, unlawful competition, collapsing buildings, unhealthy food, and so on. What all these situations have in common is that an event caused damage to a victim and that there may be reason to let someone else compensate this damage. For the rest, however, there seems to be little similarity concerning the above-mentioned situations.

Law of Torts It would therefore be quite possible to develop rules for each of them, and these rules could be fine-tuned to the various cases and the differences between them. Actually, this is what happened in common law. It has developed rules for several kinds of torts. For this reason, the rules about the different situations were originally called the *law of torts* (plural).

Negligence However, with the *Donoghue v. Stevenson* case, a development has started in common law in which one particular tort, the tort of negligence, has come to dominate an important part of the field. Negligence as a tort is assumed if someone breached a legal duty to take care towards other persons and their interests and this breach resulted in damage to someone towards whom care was due. This

development has changed the "law of torts" into "tort law," but the field of tort law still exhibits the traces of the old situation in which there were separate rules for the different torts.

Does this mean that tort law in the common law tradition is very different from that in the civil law tradition? Not really. In the common law tradition, there are, as a starting point, different kinds of torts, but the doctrine of negligence has now created a tendency to treat these different kinds of torts more similarly.

Civil Law In the civil law tradition, there are not as many kinds of torts as far as legislation is concerned. However, the *application* of the relatively few rules has been differentiated between different kinds of wrongful acts by means of judicial decisions in which the relatively uniform tort law has been interpreted.

> For instance, in the case of wilful causation of damage such as physical mistreatment, liability is more easily assumed than in case of an accident. The liability for inherently dangerous activities tends also to be greater than for events which cause damage by way of coincidence. These distinctions could not be found originally in legislation, but were based on case law. However, relatively recently, some of these developments from case law have been codified. We return to this point in Sect. 6.7.

Since the relatively uniform rules have been interpreted differently for different kinds of wrongful acts, the case law in the civil law tradition created a greater differentiation than appears to be the case on the basis of legislation only. The result is that *the difference between the civil law and the common law tradition is mainly one of style*.

6.2 The Functions of Tort Law and the Grounds of Tort Liability

6.2.1 Functions of Tort Law

The rules of tort law can, to some extent, be explained by the fact that tort law fulfills several functions, which sometimes overlap. These functions include

- the realization of compensatory justice,
- the realization of a distribution of damage over society that is both fair and efficient,
- the granting of compensation to people for damage caused by someone else,
- the prevention of damage.

6.2.1.1 Fault Liability

If one person does something wrong and thereby causes damage to another person, *compensatory justice* (also called "retributive justice") requires that the wrongdoer compensates the damage. This kind of compensation makes sense only when the person who caused the damage was at fault (did something wrong for which he can be blamed), and therefore this kind of liability is called "fault liability."

A typical example is when a burglar breaks into someone else's house and steals a laptop. This behavior is both wrongful and intentional and normally the burglar can be blamed for what he did. If the burglar must compensate the damage, this will be a case of fault liability.

6.2.1.2 Strict Liability

It sometimes happens that a victim suffers damage without anyone deserving blame for it. Normally, this victim has to bear the damage himself, but sometimes there are reasons to shift the damage from the victim who suffered it in the first place to someone else. The latter person will be liable for the damage even though he could not help it. In such a case, we speak of "strict liability."

Fairness One reason to shift the damage has to do with fairness.

The introduction of cars into everyday life has created the risk of people being injured or even killed in a car accident. Although such accidents are sometimes to be blamed on the victims themselves, it cannot be denied that the use of cars increases the chance of serious traffic accidents enormously. The imposition of an almost strict liability on car owners, who profit from the use of cars, means that the resulting damage does not have to be borne (completely) by the victims of these accidents.

Economic Efficiency Another reason to impose strict liability has to do with economic efficiency. One way to distribute damage over society may lead to less costs for society as a whole than another way of distributing the damage.

For instance, it is easier and probably cheaper that the owners of tigers insure themselves against the risk that the tigers will escape and wound people, than it is for ordinary citizens to insure themselves against the risk that they will be wounded by a runaway tiger. Imposing a strict liability on owners of dangerous animals such as tigers will then lead to less costs for society as a whole.

Possibility to Recover A third function is to allow victims, who suffered damage caused by the behavior of someone else or because of an event for which the victims were not responsible themselves, to recover this damage. This function explains both strict liabilities and liabilities for the faults of other persons, including the liability of employers and parents for faults of, respectively, their employees and their children.

If employers are liable for their employees and parents for their children, this increases the chance that the victims of damage caused through faults of employees and children will receive compensation. This chance is even further increased if employers and parents are obligated to insure themselves for these liabilities.

Prevention of Damage A fourth function of tort law is to prevent the occurrence of damage-causing events. By making persons other than those who actually suffered the damage liable to compensate for this damage, tort law promotes that these other people be more careful to avoid damage.

For example, a car producer who must compensate for the damage caused by a defective car will be stimulated to invest even more in security checks.

6.2.2 The Grounds for Tort Liability

What are the grounds if a tortfeasor (a person who has committed a tort) has to pay for the victim's damage? The answer to this question traditionally mentions three categories of cases:

1. cases in which a tortfeasor acted wrongfully and has to compensate for the damage that resulted from his wrongful behavior (liability for one's own fault);
2. cases in which someone is liable for the damage that was wrongfully caused by a tortfeasor (liability for a tortfeasor's fault);
3. cases in which a tortfeasor is liable for the damage caused by an animal or by an object for which he is responsible (strict liability).

This division of cases of liability into three categories suggests more of an order than there actually is. The three categories define so-called ideal types, typical situations on which variations are possible. The variations on grounds of liability mean that the three mentioned categories fade into each other.

6.2.3 Fault Liability and Strict Liability

One important distinction in most contemporary tort law systems is between liability based on fault and strict liability.

6.2.3.1 Fault Liability

In the nineteenth century, tort law was mostly based on the idea of fault. A fault is, in this connection:

– a wrongful act
– for which the agent can be blamed.

In Germany, legal scholars like Von Jhering thought that the principle of "no liability without fault" was unquestionable: "*Nicht der Schaden sondern die Schuld verpflichtet zum Schadenersatz*." (It is not the damage which obligates compensation, but the fault.)

6.2.3.2 Movement Towards Strict Liability

In the twentieth and twenty-first centuries, we see a tendency towards a more severe and stricter liability regime. This is frequently pithily summed up as a development away from liability based on fault towards strict liability. In other words, human fault no longer forms the point of departure, as was still the case in the first half of the twentieth century, but the question whether the sustained damage falls within the injured party's own sphere of risk or within that of someone else.

However, before adopting this view that there is a movement from fault liability towards strict liability, it is important to bear in mind that "fault" and "risk" (risk is

related to strict liability) are terms that are both overly concise and ambiguous. As long as they are not defined precisely, the terms "risk" and "fault" can only serve as catch words. For a better understanding of the specific legal rules on liability in the different European countries and the types of liability developed in case law, we will distinguish between different forms of liability.

6.3 Liability for One's Own Fault; the Common Law Approach

> Suppose that Stevenson, the manufacturer of the bottle of ginger beer that Mrs. Donoghue drank, had poor sanitary conditions in his factory, and that this was the reason why a snail got into the ginger beer. Arguably, Stevenson's behavior violated a duty of care towards the consumers of Stevenson's ginger beer in general and towards Mrs. Donohue in particular and was therefore unlawful. Stevenson could be blamed for this unlawful behavior and would be held liable under the tort of negligence.

In this section, we will focus on the question when behavior is unlawful. We have already seen that common law recognizes different kinds of torts. A complete treatment of the question of which behavior counts as unlawful would therefore have to deal with these different kinds. But we have also seen that one type of tort, negligence, has come to dominate an important part of the field of tort law. We will therefore only pay attention to this tort. In general, there are four conditions that must be satisfied for liability under the tort of negligence:

1. there must have been a duty of care,
2. this duty must have been breached,
3. there must be damage, and
4. it must be a damage for which the tortfeasor is responsible.

In this section, we will only focus on the question when a duty of care exists.

6.3.1 Duties of Care

> A lawyer stood up and tested Jesus, saying, "Teacher, what shall I do to inherit eternal life?" He said to him, "What is written in the law? How do you read it?" He answered, "You shall love the Lord your God with all your heart, with all your soul, with all your strength, and with all your mind; and your neighbour as yourself." He said to him, "You have answered correctly. Do this and you will live". But he, desiring to justify himself, asked Jesus, "Who is my neighbour?"
>
> Jesus answered, "A certain man was going down from Jerusalem to Jericho, and he fell among robbers, who both stripped him and beat him, and departed, leaving him half dead. By chance a certain priest was going down that way. When he saw him, he passed by on the other side. In the same way a Levite also, when he came to the place, and saw him, passed by on the other side. But a certain Samaritan, as he travelled, came where he was. When he saw him, he was moved with compassion, came to him, and bound up his wounds, pouring on oil and wine. He set him on his own animal, and brought him to an inn, and took care of him. On the next day, when he departed, he took out two denarii, and gave them to the host, and said to him, 'Take care of him. Whatever you spend beyond that, I will repay you when

> I return'. Now which of these three do you think seemed to be a neighbour to him who fell among the robbers?"
> He said, "He who showed mercy on him." Then Jesus said to him, "Go and do likewise".

Legally Wrongful Good and bad behavior. To love your neighbor like you love yourself is good moral behavior. Not helping the robbed and injured man lying on the side of the road from Jerusalem to Jericho will, in general, be seen as unethical behavior. But does that imply that the priest and the Levite can be held liable in a court of law for the consequences of not helping the victim? Tort law deals with the consequences of wrongful behavior. But what is *legally* wrongful? Boys throwing stones through the window of the local bakery? A fight in a nightclub where people get injured? Not coming to rescue a person at the edge of drowning legally wrongful?

Duty of Care In tort law, these questions are addressed under the heading of duties of care. Behavior is wrongful if it constitutes a breach of a duty of care. But how can we know whether there is a duty of care? Did the priest and the Levite owe a duty of care to the robbed man? Did Stevenson owe a duty of care to Mrs. Donoghue?

The notion of a duty of care plays a central role in the common law of tort. It is used to demarcate the range of persons, their relationships, and the kinds of damage, for which compensation can be claimed. It was not obvious beforehand that Mrs. Donoghue was protected by a duty of care against mistakes made in Stevenson's factory. If Mrs. Donoghue had fallen ill and her employer had suffered an economic loss because of that (Mrs. Donoghue was irreplaceable), could the employer then claim damages from Stevenson *for that kind of damage*? In other words, did Stevenson have a duty of care towards Mrs. Donoghue's employer? These are the kinds of questions that are dealt with under the heading of duties of care.

6.3.2 The Learned Hand Formula

The criteria to determine whether a particular person or organization owes a duty of care towards another person or organization form a central topic of tort law. It is not very easy to say something in general about this issue. Over 60 years ago, in the case of *United States* v. *Caroll Towing*, 159 F2d 169 (2nd Cir. 1947), the American Judge Learned Hand formulated a number of rules of thumb to determine what standard of care would be required by a shipowner to ensure that a ship does not break loose of its mooring ropes:

> to provide against resulting injuries is a function of three variables:
> 1. the probability that she will break away;
> 2. the gravity of the resulting injury, if she does;
> 3. the burden of adequate precautions.

Breach of Duty The basic idea is that a balance must be struck between the costs of precautionary measures and the costs of accidents. The costs of accidents are the product of the costs of a "normal" accident and the probability that such an accident will occur. If the costs of a precautionary measure are less than the expected costs of the accident, this precautionary measure is required and a breach of duty exists if such a measure is not taken.

Learned Hand formula Judge Learned Hand has become a legend because he did not confine himself to this clear analysis of what lawyers generally do—intuitively—when answering liability questions but rather because he went further and gave it a "scientific" twist by summarizing it in the economic formula: "*if the probability be called P*; *the injury L*; *and the burden B*; *liability depends upon whether B is less likely than L multiplied by P*: *i.e. whether B is less than PL*." This formula has become known as the "Learned Hand formula."

6.4 Liability for One's Own Fault: The Civil Law Approach

The civil law approach to torts differs from the common law approach in that the basic rules for tort liability are formulated in statutes and that these rules appear to be relatively uniform. However, because statutory rules are complemented by case law, the actual situation is not so very different from that of the common law. In general, the following conditions hold for the existence of fault liability in the civil law tradition:

1. there must be an act or an omission that unlawfully violated a legally protected interest;
2. the unlawful act or omission must have caused damage of a type that qualifies for compensation.

In theory there is still a third requirement for fault liability, namely that the tortfeasor is blameworthy. That would, for instance, not be the case with people who acted under the influence of a physical or mental handicap. The practical relevance of this third requirement is rather limited, though, because blameworthiness is usually assumed if the behavior did not match the standards which a reasonable person would apply.

6.4.1 Unlawfulness

The various civil law jurisdictions differ in the manner in which they specify what counts as an unlawful violation of a legally protected interest. The French *Code Civil* keeps it simple, with two provisions:

Code Civil Art. 1382:
Every human act which causes damage to another person obligates the agent to compensate the damages.

Code Civil Art. 1383:
Everyone is not only responsible for damage caused by his acts, but also for damage caused by his negligence or imprudence.
The *Code Civil* is not very specific about which acts lead to liability. This is different with the German *Bürgerliches Gesetzbuch*. The following central provision gives an example:

Bürgerliches Gesetzbuch § 823:
A person who wilfully or negligently and unlawfully injures the life, body, health, freedom, property, or other right of someone else, is obligated to compensate him for any damage arising therefrom.

The same obligation attaches to a person who infringes a statutory provision intended for the protection of others. If according to the purview of the statute infringement is possible even without fault, the duty to make compensation arises only if some fault can be imputed to the wrongdoer.

The Dutch *Burgerlijk Wetboek* compromises between the abstraction of the *Code Civil* and the concreteness of the *Bürgerliches Gesetzbuch*:

Burgerlijk Wetboek, Art 162, Sections 1 and 2:
A person who commits an imputable unlawful act towards someone else is obligated to compensate the damage caused by this act.
An act or omission counts as unlawful if it infringes a right, violates a legal duty or violates an unwritten norm that specifies what is required in society, unless there is a ground of justification.

Different as these provisions may be, they have in common the fact that they protect both individual rights and written and unwritten legal norms against both intentional and merely negligent violations.

6.4.2 The Cellar Hatch Case

In case of written norms, it is often easy to establish whether an unlawful violation has occurred. This may be different in connection with infringements on rights and violations of unwritten norms. The issues that we encountered in connection with duties of care in common law reappear here. The Dutch cellar hatch case illustrates this nicely.

This case, known from its facts as the *Kelderluik* or "cellar hatch" case, is both a legendary and landmark case in Dutch law. The facts of *Kelderluik* were the following:

Cellar Hatch (HR 05-11-1965, NJ 1966, 136)
Mr. Sjouwerman was an employee of the Coca-Cola Company. He was making a delivery to 'De Munt', an Amsterdam pub. He left the cellar hatch of the pub open whilst making his delivery and left some crates with bottles next to the door by way of a precautionary measure, a warning about the hole in the floor left by the open cellar hatch.
Mathieu Duchateau was a customer having a beer at 'De Munt'. Despite the crates next to the door, Mr. Duchateau fell through the open cellar hatch when he was on his way to the men's room, and he had to be taken to hospital. Mr. Duchateau claimed compensation from the Coca-Cola Company, posing the question whether Mr. Sjouwerman had taken sufficient precautions when he left the cellar hatch open.

The Dutch Supreme Court adopted a clear principle: some circumstances can require special precautionary measures because individuals cannot always be expected to pay sufficient attention to their environment and circumstances. Which factors should then be taken into account? The Court provided a number of *aspects* to be considered:

> the *degree of probability* that the required attention and care could be disregarded, but also the *degree of likelihood* that this might lead to accidents, the *gravity of the consequences of such accidents* and the *burden of adequate precautions* (emphasis added).

In *Kelderluik*, the Supreme Court judged that Sjouwerman could be blamed for not having taken into account the possible and legitimate carelessness of customers and thus for neglecting to take *sufficient* precautionary measures. As a consequence, the Coca-Cola company was liable for damages. (In Sect. 6.5, we will see why the Coca-Cola company was liable for the damage caused by Sjouwermans.)

Cellar Hatch Factors The criteria developed by the Dutch Supreme Court in *Kelderluik* led to the following general rules of thumb in connection with endangering situations:

- The level of the precautionary measures required in endangering situations is directly proportional to the degree in which the potential victim is likely to neglect his care of and attention to his personal safety—the greater the likelihood that the potential victim will neglect his personal safety in the situation, the higher the standards of precautionary measure that are expected of the agent causing the danger.
- The higher the likelihood of an accident resulting from the endangering action, the higher the standard of precautionary measures that are required.
- If the seriousness and the extent of the possible risk are greater, a higher standard of care should be used.
- If a certain behavioral pattern is more dangerous, a higher standard of care should be taken into account.
- The endangering agent, when considering the precautionary measures to be taken in the particular circumstances, has to take these precautionary measures whenever they are less burdensome (in terms of time, cost, and effort) than the magnitude of possible risk.

Most importantly, these principles establish that it is not relevant whether the *specific* danger or risk that materialized was actually foreseeable. It is sufficient to establish whether by taking the particular precautionary measures the necessary level of precaution for the *general* risks of the situation (as assessed through the rules above on objective standards) has been taken.

The reader may have noticed that the rules of thumb that were formulated by the Dutch Supreme Court are closely related to the Learned Hand formula which we encountered before. This should not be surprising, since the issues at stake in the cellar hatch case and the case which lead to the Learned Hand formula are similar in that they require the formulation of standards for behavior (duties of care) where explicitly formulated rules are lacking.

6.4.3 Intermezzo: Law and Efficiency

We have seen that in tort law cases it is often necessary to determine whether the behavior of a person was—according to the common law approach—a breach of duty or—under the civil law approach—unlawful. Often there is no written law to answer this question, and then a legal decision maker must formulate the appropriate standard for behavior himself. Damage-causing behavior can be qualified as a breach of duty or as unlawful because it violated such an unwritten standard. The question then becomes what these unwritten standards for behavior are. How can we establish which behavior counts as a breach of duty or as unlawful if there is no basis for it in written law?

Ex Post In general, there are two different ways to approach this question. One is to establish whether the damage-creating behavior was wrong in such a way that this justifies the imposition of liability on the person who caused the damage. A judge would consider this question after the damage was brought about, in light of all available information. This determination of liability only looks back, at the facts as they actually occurred, in order to establish *for this particular case* whether the damage should be shifted from the victim who suffered them in the first place to the tortfeasor who caused them. This is called "*ex post* determination", because it is done after the damage-causing facts and—which is more important—only with an eye to the damages as they actually occurred ("*post*" is Latin for "after").

On his way to the men's room, Mr. Duchateau fell through the open cellar hatch, despite the crates next to the door, and had to be taken to hospital. Is Mr. Sjouwerman liable for the damages of Mr. Duchateau? On an *ex post* determination it is possible to look at all the facts of this particular case, such as whether Mr. Sjouwerman could or should have known that the man's room was in the same corridor as the cellar hatch, whether Mr. Duchateau was drunk and whether sober persons were likely to fall through the open hatch,. . . etc. All these factors may play a role in determining whether Mr. Sjouwerman should have been more careful, and whether his behavior was unlawful in the light of the thus established standard of care.

Ex Ante It is also possible to use this case to formulate a rule that has the best results for this case and all future similar cases. This rule should not incorporate the details of the present case in order to be useable in the future. This is called "*ex ante* determination," because the rule is formulated with an eye to future cases too ("*ante*" is Latin for "before").

One might wonder what the difference is between *ex-post* and *ex-ante* evaluations. A rule that is good for an existing case is also good for future cases, is it not? Not necessarily. A rule that is formulated beforehand can still influence behavior that might cause damages, while a rule that only looks at the allocation of liability after the damages occurred cannot. The fundamental difference between *ex post* and *ex ante* evaluations in liability law is whether the law focuses only on the best allocation of existing damages or also on the prevention or minimization of future damages.

Efficiency In an *ex ante* evaluation, the issue at stake is which allocation of damage has the best results. To determine this, it is still necessary to formulate a standard at the hand of which it can be determined what "the best results" are. One such a standard is efficiency.

The branch of legal science that looks at legal rules (1) from an ex ante perspective and (2) at the hand of the efficiency standard is called *Law and Economics*. The Law and Economics approach is very influential in the law that deals with liability for damages, in particular in the USA.

According to the efficiency standard, the best result is that in which the total amount of costs is minimized. The rule that allocates liability should be formulated in such a way that the total amount of the expected costs for potential tortfeasors and potential victims of damage is made as small as possible. The way in which the damage is divided over tortfeasors and victims is only relevant to the extent that the division influences this total amount of costs.

Note that one should look at the sum of the *expected* costs, because we deal with *ex ante* determination, and try to minimize *future* costs. We find this future-regarding approach both in the Learned Hand formula and in the rules of thumb that were formulated in the cellar hatch case.

6.5 Liability for Damage Caused by Other Persons

Let us have another look at the case of Mr. Sjouwerman, who left the cellar hatch open, and Mr. Duchateau, who fell through it. Mr. Sjouwerman was an employee of the Coca-Cola Company, and as a matter of fact Mr. Duchateau claimed compensation from the Coca-Cola Company, adducing that Mr. Sjouwerman had not taken sufficient precautions because he left the cellar hatch open.

Vicarious Liability Why would the Coca-Cola company be liable for the fault of Mr. Sjouwerman? There is both a brief and a lengthy answer to this question. The brief answer is a description of the law as it actually is, while the lengthier answer

addresses the issue why the law is what it is. The brief answer is that according to the law of many jurisdictions, including the Dutch, employers are under certain circumstances liable for damages caused by their employees. This is called vicarious liability. If Mr. Sjouwerman has committed a fault, the Coca-Cola company as his employer would therefore be liable for the resulting damage.

Reasons for Making Somebody Else Liable The lengthier answer addresses the question why persons should be liable for damages caused by tortfeasors. In many jurisdictions, liability does not only exist for employers with regard to their employees but also exists for parents with regard to their children. A first observation in this connection is that the person who is liable for damages caused by a tortfeasor must have a special relation to this tortfeasor. Normally, this is a relation that makes it possible—at least in theory—to influence the behavior of this tortfeasor. An employer has this relationship to his employee, and parents have this relationship to their children.

If the employer or the parents did not do something wrong themselves, the mere presence of such a relationship is not a sufficient ground for liability; other conditions must be fulfilled too.

> If the employer or the parents did something wrong themselves, for instance lack of supervision, they would be liable for their own faults, not for the faults of their employees or children. In Germany, this form of fault liability is the only way in which employers can be liable for the wrongs of their employees. In England, such fault liability is the basis on which parents and teachers may be liable for damages brought about by their children, respectively pupils.

In most legal systems, the basic requirements for employer liability are:

1. The employee must have been at fault.
2. The employer must have had sufficient power of direction and control over the employee's activities.
3. The harm must have been caused in the course of the employment.

> Davison was employed by the Transport Board as driver of a petrol tanker. While petrol was being pumped from his truck into the underground tank of a petrol station, he lit a cigarette and threw the match on the ground. This caused a fire and finally an explosion which resulted in significant damage to property.
>
> Was his employer vicariously liable for Davison's conduct? Did Davison act in the course of his employment in lighting his cigarette? The court of first instance and the Court of Appeal found that the driver was acting in the course of his employment. The House of Lords upheld the judgment of the Court of Appeal. One of the lords, Viscount Simon, put it this way:
>
> Davison's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow and to turn off the tap when the proper quantity had passed from the tanker. Waiting and watching was part of his duties. That is why his act – throwing the match on the ground – was within his course of employment. The course of employment broadly comprised all acts done concomitantly to the accomplishment of the tasks which were entrusted to the employee. (*Century Insurance C v. Northern Ireland Transport Board* [1942] AC 509).

Deep Pocket Theory Placing liability on someone other than the tortfeasor also has an advantage for the victim who suffered the damages, namely that she is protected against insolvency of the tortfeasor. Parents tend to have more money than their children, and employers are often richer than their employees. Insurance plays a role in this connection too. The idea that if the circumstances allow it, liability should be placed where the money is, is known as the "deep pocket theory."

There are also other reasons for making employers and parents liable. One is that the employer benefits from the behavior of the employee—e.g., speeding to arrive faster to serve the next customer—and that it is therefore fair to make him liable for the consequences. Another reason is that the liability of employers and parents makes it possible to take this liability away from the employees and the children, for whom the damages might not be bearable.

6.6 Strict Liability

It happens quite often that an event causes damage and there is no obvious person to whose faulty behavior the damage can be attributed. Then the principle that everyone has to bear his own damage plays a central role. However, there are a number of cases in which there is reason to shift the damages to someone other than the victim who suffered it in the first place. They have in common that the person who becomes liable is somehow responsible for, or profits from, the fact that there is a possibility of faultless damages. Typical examples of strict liability concern damage brought about by animals and by objects that are dangerous by nature, or because they are defective.

Arguments for Strict Liability Whereas fault liability relates to the obligation to pay damages for wrongful behavior on the side of the tortfeasor, this link between liability and fault is cut through in the case of strict liability. As for the basic decision on either fault or strict liability, it is necessary to first establish the criteria on which the choice is to be determined. When we are dealing with the liability for defective products, for example, there are arguments in favor of strict liability. These arguments are that strict liability may offer

- more protection for the injured party (consumer protection),
- an incentive for improving safety,
- better options for insurance,
- fewer problems in determining liability, which saves in procedural costs.

Consequently, when dealing with product liability in the context of industrial production, arguments in favor of strict liability outweigh the arguments underpinning the adage "no liability without fault."

By keeping an animal, the keeper creates the risk that this animal will cause damage. Then there is reason to hold the keeper of this animal liable when the actual damage was caused even if he did not do anything wrong. Similarly, the

owner of a car creates the risk that the car will cause damage, even if the owner is not driving, and is not at fault in a particular case. Cars make society more dangerous, and this is reason to hold car owners liable, because they profit from these danger-creating objects.

In the remainder of this section, we will sketch the development of strict liability in the light of progressive industrialization.

6.6.1 Railroads and the Development of Strict Liability

According to Von Jhering, the only type of liability is fault liability. However, this idea was challenged by specific industrial developments. A case in point was the introduction of steam locomotives.

In the Netherlands, the first railroad was opened between Amsterdam and Haarlem in 1839. Before the introduction of a strict liability rule in the 1859 Railroad Act, injured passengers had to prove negligence on the part of the railroad company. Case law after the introduction of the Act reflects the idea that the main reason for the strict liability is to urge the railway companies to exercise utmost care in order to provide for the necessary safety of their passengers. This is why, in derogation of the ordinary negligence rules, the burden of proof was shifted from the victim to the tortfeasor. The available defense provided for in the Railroad Act is that the damage was not caused by the fault of the Railroad Company or by the fault of their employees. That the fault did not lie with the Railroad Company had to be proven by that company.

> The fact that one of the iron bars of a railroad track was broken is not considered to be a valid excuse that constitutes an absence of fault. However, if a passenger sticks his head outside the window and injures himself, this will result in a valid defense. The same holds true when a passenger keeps his fingers between the closing doors when the train is about to leave. When a passenger is hit by a ladder left unattended on the platform, the Railroad Company is liable, even if it is unclear whether the ladder was left there by an employee.

The regime that has governed railroad accidents for most of the twentieth century is basically still that of the Railroad Act of 1859, which contained the very first provision of strict liability for railroad companies.

We can fairly assume that the Dutch legislative response to the growth of railway exploitation was inspired by legislation in neighboring countries like Germany. The acceptance in the middle of the nineteenth century of a strict liability provision was a major breakthrough on the subject of extracontractual liability where the dominant view was still that liability was only acceptable where the victim could prove fault on the part of the tortfeasor. This specific derogation of the "holy" general principles of tort law served as a strong example for future discussions where a higher level of protection for the victim was advocated. It turned out to be a major breakthrough.

6.6.2 Traffic Liability

6.6.2.1 The Regime of the Dutch Road Traffic Act

Pursuant to Section 185 of the Dutch Road Traffic Act (*Wegenverkeerswet*), the owner of a motor vehicle or the person keeping a motor vehicle for another (the *detentor*, the possessor in fact; hereafter keeper) is held liable for the damage caused by a collision of that motor vehicle with a pedestrian or with a cyclist. In his capacity as the owner or keeper of a motor vehicle, a person or organization is liable for the conduct of those whom he allows to drive his motor vehicle. As a consequence, the owner or keeper incurs the risk for the faults of whoever he allows to drive the vehicle. This is therefore an example of liability for other persons' faults.

In the event of a collision with pedestrians or bicyclists, the owner/keeper is liable unless he can persuade the court to accept that there were conditions beyond the drivers' control (force majeure). In the past decades, it has become increasingly difficult in the Netherlands to run a successful defense based on the ground of "circumstances beyond the driver's control."

In theory, this is still an example of fault liability, but there are two factors that turn this "fault liability" for practical purposes into a kind of strict liability:

1. *The shift in the burden of proof*—the owner/keeper of the vehicle has to prove that he did not do anything wrong, rather than the victim having to prove that the owner/keeper did something wrong. If the owner/keeper of the vehicle cannot meet the burden of proof, he will be liable.
2. *The limitation on what counts as valid excuses*—particularly in the case of a collision involving young children, the requirements for the driver's conduct are set at such a high level that at times there seems to be, in effect, strict liability. In addition, the owner or keeper also bears the risk of any mechanical defects the vehicle may have even if he had no way of knowing about them.

6.6.2.2 The Loi Badinter

An even more extreme example of strict liability can be found in French law on traffic liability. The so-called *Loi Badinter*, introduced in 1985 by the French Minister of Justice, provides for a set of principles that are clear and simple. The basic rule in Article 3 is that the holder of a motor vehicle is liable for damages suffered by both nonmotorized and motorized victims.

Victims other than drivers of motor vehicles are indemnified for the harm resulting from their personal injuries regardless of their own fault unless it was inexcusable and constituted the sole cause of the damage.

Contributory Negligence The compensation is due without proof of fault. There is no *force majeure* defense. The only defense that is allowed as to nonmotorized persons is an extremely restricted form of "contributory" negligence (*faute inexcusable*) or the intention of the victim to commit suicide or comparable acts.

Contributory negligence or fault occurs if the damage to the victim is not only caused by the damage-causing act or event, but also by the negligent or wrongful behavior of the victim himself. An example would be if the owner of an expensive vase places it in a position from which it can very easily fall. Then, arguably, the person who inadvertently hit the vase and made it fall, does not have to pay full compensation, because the damage is also the fault of the owner.
The following example illustrates the extremity of this type of strict liability. Monsieur Gabet was driving his car on a highway. Then a man named Ouradi crossed the highway without taking any precautionary measures whatsoever. Gabet's car struck Ouradi, who was injured. Ouradi claimed damages from Gabet for his personal injuries. The Court of Appeal dismissed Ouradi's claim, because in their opinion Ouradi was guilty of an inexcusable fault by running across the highway without taking precautionary measures. The *Cour de Cassation* however quashed the decision of the Court of Appeal. According to the Cour de Cassation, the facts did *not* disclose any inexcusable fault on the part of victim.

This type of absolute strict liability comes, in its effects, close to a system of social security. The community of car owners is paying through their compulsory insurance policies for the damage suffered by traffic casualties.

6.6.3 Liability for Things in French Law

The *Loi Badintair*, as sketched above, is closely linked to the general rule of strict liability for things (accident situations in which things are involved), which was developed by the French courts in the last century on the basis of Article 1384 al. 1 French Civil Code. The *Teffaine* decision of 1896 made the first step to stricter liability by shifting the burden of proof of fault from the victim to proof of absence of fault by the wrongdoer: this led to a rebuttable fault for damage caused by a thing.

Suppose that a bottle of soft drink explodes after it was placed in the sun. On the basis of the *Teffaine* decision, the victim does not have to prove any longer that the manufacturer of the bottle did something wrong. On the contrary, if the manufacturer wants to escape liability, he must prove that the damages were *not* caused by a fault of his.

Three decades later, the famous *Jand'heur II* case of 1930 introduced a real strict liability for dangerous objects, especially including motor vehicles. The main requirements for this liability for things (an elevator, a falling tree, an escalator, cars, instruments, etc.) is an active role of the thing in case of direct contact.

For instance, a tile that falls from a roof top onto the head of a passer-by.

The owner of a thing is assumed to be its custodian and therefore liable for damage caused by this thing. However, under French law, even the producer of things can be liable, as the one being responsible for the design or construction of the product.

Stevenson would be liable for the damage of Donoghue on this ground, if their case were governed by modern French law.

This rule of strict liability for damages caused by a dangerous or broken object is so important in French tort law that it has led to a diminished role for Article 1382 Cc, the French provision for personal fault liability. The same holds true for the traditional specific rules, for example animal liability (Art. 1385 Cc) or the liability for buildings that have collapsed (Art. 1386 Cc).

6.7 Damage

There are many different kinds of damage that can result from unlawful behavior and breaches of duty and from events for which strict liability holds. It is not immediately obvious that all possible kinds of damage qualify for compensation through tort law. Some kinds of damage lend themselves better to compensation than others, and some kinds will be compensated to a greater extent than other kinds. This differentiation between kinds of damage is made explicit in the Principles of European Tort Law (PETL).

> The Principles of European Tort Law are an example of soft law, a set of rules drafted by a group of lawyers which aims at finding the common core of tort law.

Recoverable Damage In Chapter 2 of the PETL a definition of "recoverable damage" is provided in Article 2:101:

> Damage requires material or immaterial harm to a legally protected interest.

Protected Interests What constitutes a protected interest is subsequently described in Article 2:102:

(1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive its protection.
(2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.
(3) Extensive protection is granted to property rights, including those in intangible property.
(4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the agent and the endangered person, or to the fact that the agent is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.
(5) The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases.
(6) In determining the scope of protection, the interests of the agent, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

Sections 2 and 3 make clear that the protection of the human body and mind goes further than the protection of property rights such as rights in material goods, copyrights, and patents.

> A person who was wounded in a car accident also began to suffer from psychosomatic defects, such as a change in character, weakness in mental performance, speech disturbances, paralysis and reduction in libido. The German Bundesgerichtshof (April 9th, 1991) decided that if these defects could be attributed to the accident (which was probable), they should be taken into account in determining the amount of immaterial damages which should be compensated.

Purely Economic Interest The protection of purely economic interest does not extend as far. An example of a purely economic interest would be the loss of earning capacity suffered by a driver (e.g., traveling salesmen) caught in a traffic jam that was caused by a car accident. The chances are slim that the tortfeasor who caused the car accident will also have to pay for these purely economic losses.

> If a person is injured and as a consequence cannot work for some time, the damage is not a purely economic interest anymore, since it is connected to a non-economic interest, namely physical integrity. The compensation of such damages is handled under the category of bodily integrity and therefore tends to be allowed more easily.

Losses of Third Persons In the Draft Frame of Common Reference (DCFR), a German soft law project led by Von Bar and sponsored by the European Committee, we find a special provision for "Loss suffered by third persons as a result of another's personal injury or death" in Book VI, Article 2:202:

(1) Non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person.
(2) Where a person has been fatally injured:
    (a) legally relevant damage caused to the deceased on account of the injury to the time of death becomes legally relevant damage to the deceased's successors;
    (b) reasonable funeral expenses are legally relevant damage to the person incurring them; and
    (c) loss of maintenance is legally relevant damage to a natural person whom the deceased maintained or, had death not occurred, would have maintained under statutory provisions or to whom the deceased provided care and financial support.

Comparable provisions may be found in many jurisdictions, either in a civil code or in a case law. It is clear that the descendants of a deceased person have a claim against a tortfeasor for the wrongful death of their loved one.

6.8 Some Conclusions: Who Is My Neighbor in Law?

In the introduction, it was stated that tort law is about finding the criteria to determine whether a loss can be shifted from the victim to the wrongdoer. To whom do we have legal responsibilities and to what extent? But tort law deals not only with situations where the wrongdoer is personally held liable for his own (wrongful) behavior. It deals also with questions such as whether the parents of stone-throwing boys can be held responsible for the wrongful behavior of their sons. In the second half of this chapter, an illustration was given of damage that was not directly connected to someone's wrongful behavior but resulted from dangerous objects like railways and cars in traffic. We have seen that as early as in the beginning of the nineteenth century, a stricter form of liability was developed, by using the technique of shifting the burden of proof from the victim to the railroad company. Later on, a more material type of strict liability was introduced, when the liability is shifted towards somebody else without even the possibility to prove the absence of fault.

The most extreme examples of strict liability can be found in French law. Its system of traffic liability provides for an absolute liability. In accidents in which a car is involved, the owner is always liable without having any real defense. This comes close to a system of social security. Car owners are obligated to take care of their fellow traffic participants as if they were their neighbors. Like the Good Samaritan, they cannot look the other way when a pedestrian is injured. There is not only a moral obligation to take care of strangers in need, but it has also become a legal obligation to compensate if the stranger was injured by a modern car.

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Criminal Law

7

Johannes Keiler, Michele Panzavolta, and David Roef

7.1 Introduction: The Nature and Function of Criminal Law

John B. has recently lost his job as a civil servant. He embezzled money from his employer, the municipality, which his rival Markus M. had reported to B's superiors. Disgruntled and desperate for revenge John decides to kill M. He buys a cake from a local bakery to which he adds a large dose of arsenic and subsequently sends it by post to Mr M's house, where M. lives together with his wife. As Mr M. is not at home on the day the cake is delivered, Mrs M. gladly accepts the parcel. Although the parcel is addressed to her husband, Mrs M cannot resist the temptation and cuts herself a nice piece of cake. She dies that very evening from arsenic poisoning.

Under extreme media pressure, the police engage in a swift investigation. They carry out a forensic analysis of the dead body, question Mr M and all the family relatives, and thoroughly search their houses. Having found out that M's wife had a love affair with a neighbour, the police place M in custody for murder. The arrest receives large media coverage, with the police being praised for having discovered the culprit so swiftly. Few days later John B. voluntarily goes to the police claiming that he might have information on how M killed his wife. He narrates that few weeks before the lethal incident he had a chat at the office with M during a coffee break about how he had managed to kill the mice infesting his house by using poison. On that occasion M had asked him to provide him with some of that poison because he shared the same problem. M. is brought to trial on the charge of murder, where he is acquitted. The cross-examination of John B. by M's counsel, combined with the depositions of the local baker and of some employees of the municipality proved crucial. A month later John B. is taken to trial and convicted for murder.

Crime and criminal law arguably constitute omnipresent topics in our society. Literature, newspapers, and television programs are full of examples of the one above, which seem to fascinate and appall us at the same time. Likewise, issues of criminal law and criminal policy often feature prominently in political discussions and election campaigns. Citizens demand security from their governments, and criminal law seems one suitable tool for the task of providing it.

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Humans have always construed societies dependent on some social order and have developed rules to assure the continuity of that orderly society and to protect its members. Crudely put, criminal law can be defined as a body of rules by which the state prohibits certain forms of conduct because it harms or threatens public safety and welfare and that imposes punishment for the commission of such acts.

Already early Babylonian law, as well as the Roman Twelve Tables and the Ten Commandments of the Christian Bible, included rules on crimes such as theft, adultery, rape, murder, etc. However, it would be a fallacy to believe that contemporary criminal law is still confined to these traditional and most prominent forms of wrongdoing. In modern society, the realm of criminal law has been considerably extended and nowadays also covers a multitude of fields spanning from environmental and economic crimes to tax and traffic offenses, etc.

Crimes as Public Wrongs Two prominent features of criminal law distinguish it from other branches of law. On one hand, criminal law deals with so-called public wrongs as opposed to private wrongs (with which civil law is concerned). Crimes are socially proscribed wrongs that concern the community as a whole. This fundamental principle also shows itself if one compares criminal law with civil law cases. A criminal case is between the whole political community, the state or the people, and the defendant. It expresses a hierarchical relationship between the state and the individual who is called to answer for his wrongful and blameworthy behavior. Conversely, civil law cases take place between two equal parties, and it is up to the person who was wronged to seek legal redress.

Punishment and Censure Furthermore, perhaps the most important difference with other branches of law is that a violation of the rules of criminal law commonly triggers the imposition of public censure and (severe) punishment. However, the imposition of criminal punishment constitutes a severe encroachment on an individual's freedom and autonomy and should therefore not be imposed lightly and only as a last resort (*ultima ratio*). For that reason, a multitude of different doctrines have been developed that aim to assure that the attribution of liability and punishment remains fair and just. Some of these doctrines will be discussed throughout this introductory chapter.

A popular folk conception of criminal law takes a victim-centered view and perceives criminal law as an instrument of retaliation. By means of criminal law, the perpetrators of (heinous) crimes receive the punishment they deserve for their criminal deeds. However, such a view is oversimplistic and forgets that criminal law is also and perhaps more importantly an instrument of both social control and control of governmental power, protecting not only society against crime but also the human rights of citizens, including criminals, against a too intrusive state.

Criminal law influences and regulates behavior in a way we see fit in our society. This is done by limiting and protecting freedoms at the same time. Criminal law creates freedom for human beings by protecting important interests, for instance their property rights. On the other hand, it limits freedoms by closely

circumscribing their scope and boundaries. Criminal law protects property by prohibiting unlawful appropriation, theft for instance, and also circumscribes the scope of the usage of this property by proscribing that no other human being wrongfully ought to be harmed by it.

Criminal Law: Between the Sword and the Shield In the light of the foregoing, it becomes apparent that criminal law has two functions that require delicate balancing On one hand, it is a tool to maintain public order and control deviant social behavior; on the other hand, its function is to canalize and circumscribe the application of coercive measures and punishment in legally determined channels that respect basic human rights. In other words, criminal law lays down rules under which the state can exercise its powers and thereby protects the citizen from arbitrary and disproportional state measures. Thus, criminal law functions, on one hand, as a tool of the state against its citizens to control deviant behavior and, on the other hand, as a tool of the citizens against repressive state powers. In other words, criminal law has both a crime control function (sword) and a safeguard function (shield) in our democratic society.

Questions After this brief introduction to the nature and function of criminal law, this chapter sets out to discuss a number of central questions of criminal law and criminal procedure. The first question, addressed in Sect. 7.2, is how we can or ought to decide which conduct should amount to a criminal offense in a liberal society. Subsequently, in Sect. 7.3, we will dwell on how the most salient feature of criminal law, i.e. the imposition of punishment, can be justified.

The approaches of criminal justice systems can, at first sight, seem quite diverse, but one may wonder if it is nevertheless possible to unearth some basic structure of crime. Section 7.4 will therefore try to answer the question as to what the basic structure of a criminal offense looks like. In Sect. 7.5, we will subsequently discuss which objective elements need to be fulfilled in order for criminal liability to arise. The sixth question to be answered relates to the mindset or state of mind with which a person needs to act in order for criminal liability to arise. Must it always be one's purpose to achieve a certain goal, or will sometimes inadvertence also suffice for imposing criminal liability? These questions will, among others, be discussed in Sect. 7.6. Afterwards, we will turn to liability-negating circumstances. Will killing another human being, stealing, or destroying property always and inevitably lead to criminal liability, or does criminal law perhaps also accept exceptions to the legal commandment "Thou shall not kill or steal"? This will be the topic of Sect. 7.7.

Subsequently, we will strive to answer the question of what the criminal law's reaction will be in case the perpetrator fails to accomplish what he initially set out to do. Will he escape liability completely, or are there perhaps good reasons to impose punishment despite the fact that the envisaged result did not materialize? These issues will be discussed in Sect. 7.8.

As this is an introductory chapter on criminal law, we focus only on some concepts and doctrines related to the criminal liability of one single perpetrator,

like in the example given above. We have purposely left out any questions regarding the more complex scenario of the liability of multiple perpetrators, such as accomplices and others that contribute to the realization of an offense.

The last sections of the chapter deal with the law of criminal procedure. Section 7.9 addresses the question what interests are at stake in the criminal process. Section 7.10 seeks to answer the question of what the basic structure of the criminal process looks like, while Sect. 7.11 discusses how the criminal justice systems can be categorized according to the their features. Section 7.12 revolves around the cornerstone principle of the presumption of innocence and explores what it means for an individual to be presumed innocent. The following part examines what other basic principles should apply in order for criminal proceedings to respect the individuals' fundamental rights (Sect. 7.13). The chapter will end with some brief concluding remarks (Sect. 7.14).

7.2 Which Conduct Ought to Be Criminal? The Criminalization Debate

It has been explained above that, among others, criminal law is a mechanism for the preservation of social order. A fundamental preliminary question in this connection is as follows: which forms of conduct should rightly be dealt with by means of criminal law? To criminalize a certain kind of conduct is to declare that it amounts to a public wrong and that therefore it ought to be avoided. To provide a pragmatic incentive to adhere to its rules, criminal law uses public censure and punishment as a sanction to rule violations. The consequences of violating criminal norms are so onerous and severe for citizens that the decision to criminalize conduct should never be taken lightly and should always require the careful consideration of a variety of competing interests and factors. Failure to do so not only may lead to overcriminalization—it is, for instance, now a criminal offense in the Netherlands for a person under 18 to possess or consume alcoholic beverages in public places—but also may create an oppressive criminal justice system.

Unfortunately, there exists no ready-made formula by which we can determine whether or not criminal law should be used in a certain situation. There is no single master principle from which the content of criminal law can be derived. The range of actual and potential crimes is simply so wide and varied that this seems unattainable. In practice, we will therefore have to accept that the boundaries of criminal law are not fixed but are rather socially, historically, and politically determined. Consider, for instance, that adultery and witchcraft were once well-established criminal wrongs, while it was at the same time considered to be legally impossible for a husband to rape his wife. Since then, the views of society and accordingly the law have drastically changed. Nevertheless, it remains important to identify interests that are generally thought to warrant the use of criminal law and refine notions such as harm and wrongdoing that usually influence and inform the criminalization debate within criminal justice systems.

The Minimalist Principle Fundamental in this connection is the minimalist principle, which holds that criminal law should only be used as a last resort (*ultima ratio*). Morality, social convention, peer pressure, and also civil (law of tort or contract) and administrative laws are other (informal) techniques of control, and in many instances it seems preferable to leave the enforcement of certain forms of behavior to those forces. The state's most powerful weapon should be used scarcely—Thor's hammer was simply not meant to drive nails!

The Principle of Individual Autonomy A further important principle within the criminalization debate is that of *individual autonomy*. The principle is central to most liberal political theories and essentially holds that citizens should be free from undue state powers in making their own choices and should be the masters of their own fate. This arguably limits the creation of offenses based on paternalistic grounds, i.e. offenses where the state deprives citizens of individual choice supposedly for their own good. Many drug offenses (including violations of alcohol and tobacco laws) are, for instance, often based on paternalistic considerations.

The Principle of Welfare However, the principle of autonomy is certainly not absolute. Besides issues such as whose autonomy should function as a yardstick (e.g., the autonomy of men and women, the rich or the poor, respectively), it is evident that a citizen will never be able to fully exercise his/her autonomy if the state fails to create the necessary conditions for the exercise of autonomy. Certain collective goals and interests, such as environmental protection, economic and financial stability, and food and product safety, are pivotal in a society and therefore also warrant protection under criminal law.

This line of thought often finds expression in the *principle of welfare*, which emphasizes the social context in which the law must operate and gives weight to collective goals and interest such as protecting the environment we live in or maintaining law and order in society. The principle of welfare and the principle of individual autonomy should however not be perceived as opposites but rather as connected and mutually interdependent principles that deserve careful consideration within the criminalization debate. When do the needs of the many really outweigh the needs of the few? While there clearly can be conflicts between the two principles, if the principle of individual autonomy is taken to require that people are free to and can peruse their own goals (positive liberty), the principle of welfare may work towards the same end by protecting common facilities (e.g., schools), structures (e.g., unemployment or pension schemes), and systems (e.g., the tax or criminal justice system), from which citizens benefit.

The Harm Principle In any case, the central notion and starting point of any criminalization debate is the *harm principle*. In the words of John Stuart Mill:

> [. . .] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

The principle was initially designed to prevent the criminalization of conduct exclusively based on moral or paternalistic grounds. A conduct that may be immoral (such as adultery) but that is not harmful to others should not be the concern of criminal law, so the argument runs. However, the problem is that the notion of harm is a very flexible one. How can we define harm properly so that it retains a critical and limiting dimension? It seems obvious that if we define harm as "harm to society", almost any conduct could be fitted under this definition.

Legal Moralism The counterpart to the harm principle can be found in *legal moralism*. It seems evident that criminal law has close ties to morality. Crimes such as murder or rape arguably criminalize moral wrongdoing and are therefore almost universally condemned. One may therefore wonder if the simple fact that a certain conduct is considered morally wrong is in itself already sufficient to criminalize it.

In practice, morality is certainly influential for the criminalization of some forms of behavior. Consider, for instance, the offenses of bestiality (a.k.a., animal sex), disturbing a funeral, or desecration of graves, which are arguably to a large extent founded on moral values. Yet reliance on morality is inherently problematic for a variety of reasons. First, we would need to determine which morals are to guide the criminalization debate—liberal morals, communist morals, or the morals of the church or other religious groups? Second, moral values are subject to constant changes and are therefore problematic to guide the legal debate. For many years, public nudity was, for instance, prohibited as it was considered immoral, but nowadays in Europe nudity, for instance on beaches, hardly raises eyebrows anymore. In addition, contentious issues such as abortion, prostitution, and euthanasia are the subject of a diverse and shifting debate in modern multicultural societies, which makes it doubtful that morality will always provide a good compass to explore the limits of criminal law.

The principles outlined above all deserve careful consideration and should guide and inform the political debate with regard to the creation of new offenses. Unfortunately, in practice, it is often political opportunism, as well as moral outrage and panic in society, rather than a carefully balanced principled approach that drives the creation of new offenses.

7.3 Theories of Legal Punishment

Since punishment involves pain or deprivation of some fundamental rights (e.g., freedom), its intentional imposition by the state requires justification: what could justify a state in using criminal law to inflict burdensome sanctions upon its citizens when they violate certain legal rules? Due to its inherent painful character and far-reaching impact, punishment requires a solid legitimization. In the philosophical and political debate, one may distinguish two main types of theories of punishment: utilitarian and retributive. On purpose we leave out some mixed or hybrid theories and theories that give alternatives to criminal sanctions, like restorative justice.

7.3.1 Utilitarian Theories

Consequentialism According to Jeremy Bentham's classical utilitarianism, laws should be used to maximize the happiness of society. This means that punishment can only be justified if the harm that it prevents outweighs the harm it creates through punishing the offender. The state should therefore only inflict as much punishment as is needed to prevent future crimes. Utilitarian theories are "consequentialist" in nature; they are all forward-looking theories of punishment as criminal sanctions are only justified when they have beneficial consequences, like deterrence of criminal behavior. If the realization of such future-oriented goals fails to occur or has more negative side effects, a utilitarian justification for punishment may be absent.

Deterrence A major utilitarian rationale for punishment is *individual deterrence* and *general deterrence*. Individual or specific deterrence punishes an offender in order to prevent the same person from reoffending. General deterrence uses the threat or example of punishment to discourage other people from committing crimes. A recent example of an attempt at general deterrence is that most European systems have significantly increased the penalties for driving under the influence of alcohol in order to deter citizens from drunk driving.

In discussing whether punishment has a deterrent effect, critics point out that the high recidivism rates of persons sentenced to prison are evidence of a lack of effectiveness of individual deterrence. There are also some limits to the effect of general deterrence. This theory assumes that human beings are rational, autonomous individuals who are always able to calculate the risk of being caught and convicted for the commission of an offense. Critics consider this to be an unrealistic view, arguing that most people remain law-abiding, not because they fear criminal sanctions but as a result of moral inhibitions and socially accepted norms of conduct. Moreover, some crimes, such as sexual offenses and crimes committed under the influence of drugs, can hardly be deterred as their perpetrators don't rationally weigh the benefits versus the costs before breaking the law.

> However, this fails to account for cost/benefit analyses that may occur more implicitly or less strategically as criminals commit their illegal behaviors.

Rehabilitation Another utilitarian rationale for punishment is rehabilitation. The object of rehabilitation is to prevent future crime by giving offenders the necessary treatment and training that enable them to return to society as law-abiding members of the community. We may think here of programs that will teach prison inmates how to control their crime-producing urges, like the tendency to abuse drugs or alcohol or to commit sex crimes (e.g., pedophilia). Part of a classical rehabilitation program is usually that an offender will be released on probation under some conditions.

7.3.2 Retributive Theories

The counterpart to utilitarian goals of punishment is retribution. According to retributive theories, offenders are punished for their crimes because they *deserve* punishment.

Crime Deserves Punishment Where utilitarians look forward by basing punishment on social benefits, retributionists look backward at the crime itself as the rationale for punishment. According to retributive theories, there is an intrinsic moral link between punishment and guilt. Punishment is therefore primarily a question of responsibility for the crime committed (just desert) and not of beneficial consequences. One of the best known ancient forms of retributive thinking can be found in the *lex talionis* of Biblical times: "an eye for an eye, a tooth for a tooth, and a life for a life." One should be punished because a crime has been committed, and the punishment should be proportional to the seriousness of the offense and the degree of culpability of the offender: "Let the punishment fit the crime" captures the essence of retribution.

Justice or Vengeance? The main criticism against retribution is that the fundamental question why an offender deserves to be punished in the first place is not that easy to answer. Retribution may reflect a basic intuition of justice—what goes around comes around—but it may in fact be nothing more than a rationalized desire for vengeance. In short, how can we prove this alleged moral link between crime and punishment? Isn't it strange to believe that the moral balance disturbed by an evil act (crime) can simply be restored by inflicting upon the offender another evil (punishment)? Some retributionists attempt to answer this question by viewing the offender as a person who has taken an unfair advantage of others in society by committing a crime and by assuming that punishment restores fairness. If society would allow a person who violates the law to continue to enjoy the illegal benefits, he would be given an unfair advantage over citizens who do obey the law.

Others argue that punishment is justified because retribution is society's way of expressing and communicating through the apparatus of criminal law a moral disapproval of certain transgressions. Punishment thus functions as a means of societal condemnation and denunciation.

To conclude this section, we should note that there is no such thing as an ultimate theory of punishment. In practice, the modern European conception of punishment is a pragmatic combination of utilitarian and retributive theories. However, it is interesting to see that in the last three decades, there is a revival of retributivist thinking, of the idea that the justification of punishment lies in its intrinsic character as a deserved response to crime. However, much depends also on the nature of the crime. For instance, the punishment of economic crimes, like tax fraud, is more motivated by deterrence than by retribution.

7.4 The Structure of a Crime

7.4.1 The Actus Reus and Mens Rea Dichotomy

Although penal laws differ greatly from country to country, it is nevertheless possible to discover on a doctrinal level some striking similarities among different criminal justice systems. It seems, for instance, to be a general principle of law that the attribution of liability generally requires an analysis of two aspects. Each crime can be split into *actus reus*, the objective element of a crime, and *mens rea*, the mental or subjective element of the crime. The offense of murder is, for instance, often defined as the intentional killing of another human being. In this case, the *actus reus* consists of killing another person, while the *mens rea* element of this offense requires that the perpetrator did so intentionally. In our opening case, it seems clear that the *actus reus* requirement of murder has been fulfilled as Mrs. M. has been killed by the poisoned cake. But how about the *mens rea* requirement? Did the defendant really intend to kill Mrs. M.? This seems more difficult to establish, but as we will discover later on, it all depends on how intention is defined in a legal system (see Sect. 7.6).

In any case, in order to be liable for murder, a perpetrator needs to fulfill both the *mens rea* and the *actus reus* requirements. This legal demand often finds expression in the famous Latin phrase *actus non facit reum nisi mens sit rea*, which can loosely be translated as "an act does not make a man guilty unless his mind is (also) guilty."

This important dichotomy in criminal law arguably stems from the distinction between the objective or tangible side of a person's conduct, which is susceptible to objective assessment, and the intangible, subjective side of a person's conduct, i.e. his state of mind, which is not. Furthermore, as modern criminal law has its roots in the tradition of the Enlightenment, the very effort to distinguish between objective and subjective elements of criminality rests on the old Cartesian conception that human beings consist of two separate elements, i.e. mind and body.

In order to be held criminally liable, the elements generally need to be present simultaneously, as a person cannot be held liable in a liberal society for a conduct that he did not intend and at most contemplated (thoughts are free). This basic distinction between *actus reus* and *mens rea* is however not a hard and fast one, and it should be kept in mind that the two notions are best viewed as conceptual tools under the umbrella of which a multitude of different doctrines are pigeonholed. Under the heading of *mens rea*, for instance, the different gradations of intention, recklessness, and negligence are frequently discussed (see Sect. 7.6). The *actus reus* element, on the other hand, is generally considered to include the doctrine of conduct, including omissions (see Sect. 7.5), as well as the doctrine of causation.

7.4.2 Two Frameworks for Assessing Criminal Liability

7.4.2.1 The Bipartite Structure of Crime

Criminal liability is often assessed according to a certain structure or framework. Legal theorists have developed two distinct ways of thinking about the internal structure of criminal offenses. Common law courts have traditionally followed a bipartite structure, simply distinguishing between objective (external) and subjective (internal) aspects of crime. Thus, the framework for assessing liability in this case simply requires that the two basic elements of a criminal offense, i.e. *actus reus* and *mens rea*, are fulfilled.

Although the bipartite system offers the convenience of theoretical simplicity, it also has some inherent shortcomings. For one, it fails to account for the entire range of defenses that are grouped under the categories of justification and excuses. Notions such as self-defense or insanity show many complexities that cannot easily be analyzed as part of either *actus reus* or *mens rea*.

A related but nevertheless distinct problem is that this approach seems to conflate the concept of *mens rea* with (moral) blameworthiness. The two concepts arguably denote different things, however. A person could have fulfilled the *actus reus* of a criminal offense with the corresponding *mens rea* but still escape liability due to the absence of blameworthiness. Just think of a person who fatally stabs his wife with a knife. From an objective point of view, the *actus reus* and *mens rea* requirements of murder seem clearly fulfilled here. The defendant killed another human being (*actus reus*), and he did so intentionally (*mens rea*). However, whether he can also be blamed for this offense is an entirely different question. It is, for instance, conceivable that the person at the time of the offense suffered from delusions as an unexpected side effect of his multiple sclerosis medication, which would raise doubts as to his (personal) blameworthiness.

7.4.2.2 The Tripartite Structure of Crime

Many civil law systems, such as those of Germany and the Netherlands, have therefore developed an entirely different framework for assessing criminal liability. According to the there prevalent tripartite structure of crime, the assessment of criminal liability takes place in three stages. In stage one, it needs to be assessed whether or not the legal elements of the statutory offense definition (i.e., *actus reus* and *mens rea*) have been fulfilled. In the second stage, the wrongfulness (*Rechtswidrigkeit*) of the conduct in question is assessed, while the third stage is devoted to assessing the blameworthiness of the defendant (*Schuld*). Thus, the issues in the tripartite framework of criminal liability line up in the following way:

1. Fulfillment of offense definition (*actus reus* and *mens rea*),
2. Wrongdoing,
3. Blameworthiness.

When it can be proven that a person has committed an act that falls within the definition of an offense, the presence of wrongdoing and blameworthiness is

generally assumed. Only if exceptional circumstances present themselves, wrongdoing or blameworthiness might be negated. A successful justificatory defense may, for instance, deny wrongdoing, while a successful excusatory defense is sought to deny blameworthiness (see also Sect. 7.7).

One critical feature of the tripartite system deserves emphasis here. In the bipartite framework of common law, the ordering of the elements is not important. One can consider issues bearing on *mens rea* either before or after those related to the *actus reus*. In the tripartite system, on the other hand, the order is crucial. The offense definition needs to be evaluated first, followed by the requirements of wrongdoing and blameworthiness. The three are logically connected. A certain conduct can only be considered wrongful if it first fulfills the offense definition. And conduct can only be considered blameworthy if it is found to be wrongful. In other words, in the tripartite system, there can be wrongdoing without blameworthiness but there can never be blameworthiness without wrongdoing.

From a comparative perspective, an interesting question in this context is how the bipartite and the tripartite structure can be reconciled. The differences seem great on first sight, but matters may become clearer once we come to realize that the common law concept of *mens rea* carries a descriptive as well as a normative connotation. On a descriptive level, *mens rea* simply refers to the question whether intention or negligence according to the offense definition can be established.

However, on a normative level, the term *mens rea* carries overtones of (moral) blameworthiness and refers to the question whether the offender can be blamed for his conduct. In the tripartite structure, the concept of *mens rea* in the first stage of the evaluation scheme is thus reduced to its purely descriptive connotation, while the normative aspect of the concept has been forged into a separate assessment category (stage 3). Likewise, the notion of wrongdoing is, in common law systems, often implied in the concept of *actus reus*, which is often seen to require that the conduct in question was in violation of the law and thus wrongful. From a comparative perspective, the picture that emerges is that of Fig. 7.1.

7.5 Actus Reus: Commission Versus Omission

It has already been indicated that under the label of *actus reus*, a variety of different doctrines are subsumed. One fundamental notion is the doctrine of conduct, also often referred to as the "act requirement." The doctrine of conduct traditionally plays an important role in establishing and describing general preconditions for liability. It has close ties to the principle of individual autonomy, which constitutes a cornerstone of any liberal criminal justice system. The conduct requirement aims to ensure that the law treats citizens as responsible subjects, capable of rational choice, rather than objects of arbitrary state coercion. Holding people liable, for instance because of their race, religious belief, political or sexual orientation, or their political affiliations, even though they did nothing wrongful, would not only fail to respect citizens' autonomy but also furthermore make the application of criminal law an arbitrary and oppressive enterprise. Therefore, all penal systems

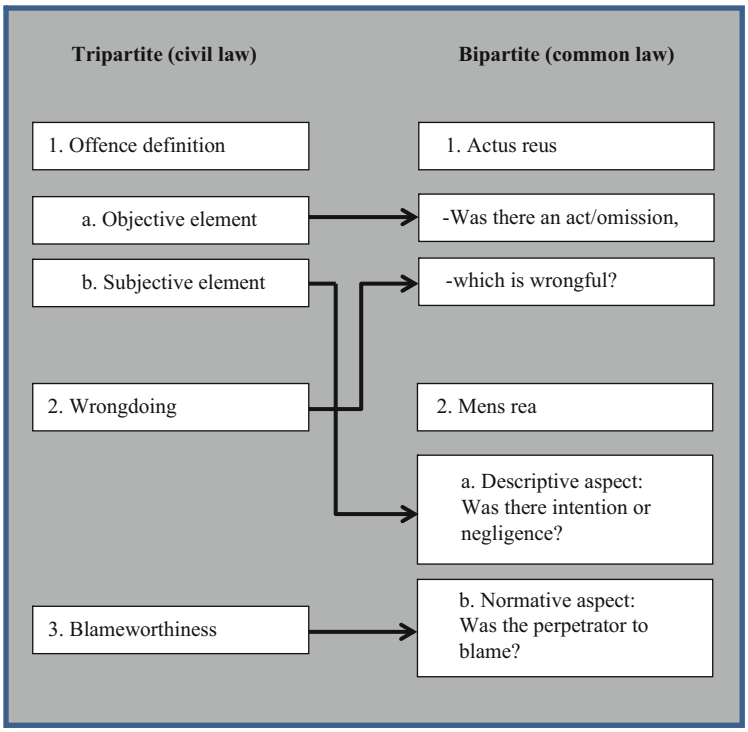

Fig. 7.1 The bipartite and tripartite systems

generally agree that the imposition of criminal liability requires at the very least some form of conduct controlled by the perpetrator.

7.5.1 Offenses of Commission

However, the act requirement has caused some doctrinal frictions because of the long-standing practice of defining action by looking at its superficial outward manifestation: the movements of limbs. Traditionally, action in criminal law has been defined as "willed bodily movements." This theory is based on the dualistic concept of man as creatures of *animus* (mind) and *corpus* (body). In other words, the animus, i.e. the human will, is seen as the cause of physical action as willed bodily movements. The problems with this definition are manifold. Foremost, the reliance on the joinder of movement and will presupposes a human being as the origin of action. However, in modern society, many legal systems also impose punishment on corporations or other organizations for wrongdoing committed by these "legal entities." Just think of a company that intentionally pollutes the groundwater in order to cut costs. The conduct of these legal entities clearly does not fit into the description of conduct as willed bodily movements.

On a more philosophical level, further issues arise. The one is nicely encapsulated by Wittgenstein's observation: [. . .] "when 'I raise my arm', my arm goes up. And the problem arises: what is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?" It seems that we can only perceive the will by witnessing it in action. We thus end up in a definitional circle. We can only objectively perceive action and subsequently explain the action as a manifestation of the agent's will. According to this theory, action is thus assessed in a vacuum, disconnected from its social ramifications. This leads to questionable outcomes, as nature determines not alone what an act is but also the social context in which it occurs. Furthermore, it is arguably not the will that distinguishes mere movement from action but rather social definition. Many systems have therefore started to move away from the definition of action as willed bodily movements and nowadays adhere to a social theory of action in which action is interpreted in the social context in which it occurs. Meaning is not fixed; it is socially defined, so it is argued. The movement of a hand can thus in one context be interpreted as a greeting and in another as a threat.

7.5.2 Criminal Omissions: Liability in the Absence of Action

Be that as it may, the shortcomings of the "willed bodily movement definition" become particularly apparent in the context of omission liability. While in paradigmatic cases criminal conduct will undoubtedly involve bodily movements such as shooting, stabbing, stealing, etc., there are certain situations where liability may also arise out of a failure to act. Think, for instance, of a mother who omits to feed her child, leading to his starvation. It seems clear that criminal censure would be in order here, but adhering to a definition of action as willed bodily movement would imply that no liability can arise in the case of inaction. Nevertheless, virtually all criminal justice systems accept that certain failures to act can give rise to criminal liability, albeit in different degrees.

An omission can loosely be defined as a failure to act in situations in which the law would have required the perpetrator to act in a certain way. Liability for omissions always presupposes that the perpetrator in question violated a duty of care (towards the victim). Duties of care can arise in two different ways, in turn giving rise to two separate forms of omission liability:

1. offenses of failing to act,
2. commission by omission.

7.5.2.1 Offenses of Failing to Act

The legislator is of course free to enshrine duties of care, requiring action, in specific statutes. In the economic or the regulatory context, this happens frequently. Statutes may, for instance, require economic actors to behave in a certain way to assure the highest possible product safety or to protect the environment.

The paradigmatic case of statutory duties of care can however be found in the "Good Samaritan" or "easy rescue statutes." Article 450 of the Dutch Criminal Code, for instance, imposes punishment on the failure to take steps that one could take without danger to himself to save another from death. Likewise, Section 323c of the German Criminal Code imposes liability for the failure to render assistance during accidents, common danger, or emergency.

Some scholars have argued that such easy rescue statutes intrude too far into the personal liberty of the citizens and should therefore be rejected. As free and independent individuals, we are not supposed to function as our brother's keepers, so the argument runs. This is, for instance, the prevailing view in the English penal system where a failure to render aid cannot give rise to liability. As early as in 1887, the scholar Stephen wrote in his digest of the criminal law: "A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence."

7.5.2.2 Commission by Omission

Next to imposition by written law, the second way in which duties of care may arise is by judicial interpretation. Over the years, courts have in their case law created duties of care that will, in certain situations, give rise to liability for failure to act even though the applicable statutes in question were worded in terms of positive action. With regard to the offense of murder, for instance, the crucial question thus becomes in which circumstances the verb "killing" can be extended to encompass also cases of letting die. However, the extensive interpretation of "killing" that is necessary to make it include cases of letting die raises questions of legal certainty, as it seems difficult for citizens to know beforehand when the courts will assume a duty of care.

Over time, a variety of duties of care have been created by case law. Although these duties are manifold and the terminology in which they are framed slightly differs from country to country, they can nevertheless, with regard to their content, be catalogued in the following way:

a) Duties imposed on a person in a special relationship to the victim—these duties may range from family and domestic relations to business or economic relationships. Parents have, for instance, a duty to protect their children from harm, and spouses are under an obligation to care for each other.
b) Undertaken duties—under this category, cases can be subsumed where a person has voluntarily assumed a responsibility or has undertaken a duty but has not fulfilled his "obligation" with the occurrence of harm as consequence. Think, for instance, of a swim instructor who omits to rescue his student from drowning.
c) Duties based on specific qualities of the offender—many people, whether at the workplace or otherwise, are subject to particular duties flowing from their social role/position. For instance, different duties might apply to police officers, building contractors, managers, or doctors. The level of care required from this class of persons is usually considerably high. Taking into account their training and skill, they are deemed to react swiftly and diligently to prevent the occurrence of harm.

d) Duties based on ownership or on responsibility for a source of danger—under this category fall cases where ownership or responsibility for a source of danger can give rise to a duty of care. A homeowner, occupant, or landlord can thus be under a duty of care if due to particular circumstances protected legal interests are endangered in the spatial sphere of the lodging. For instance, if a house owner neglects to maintain the heating installation of his property properly, liability may arise should one of the occupants incur harm due to his failure to act.
e) Duties based on the creation of a dangerous situation—finally, it seems to be a generally accepted principle of law that one is under a duty to prevent harm that might be caused by prior conduct that created a source of risk or danger. For example, if two construction workers dig a hole and fail to take appropriate safety measures to avoid that somebody else will fall in and get injured, they may incur liability for causing bodily harm by omission, provided the required mens rea can be proven. This last case differs from the aforementioned duties based on the responsibility for a source of danger. Here, the law requires that an interest is "rescued" from the imminent danger created by the perpetrator, rather than imposing a general duty to maintain safety.

7.6 Mens Rea or the Subjective Element

After having discussed the structure of crime and liability for crimes of commission and omission, it is now time to turn our attention to the subjective requirement of *mens rea*. Next to an *actus reus*, the objective element of a crime, most offenses require a *mens rea*, the mental or subjective element of a crime. Take for example the offense definition of manslaughter in article 287 of the Dutch Criminal Code: "a person who intentionally takes the life of another is guilty of manslaughter." The taking of life is the actus reus of the crime, and the required intention as to that conduct is the necessary mens rea.

Different Subjective Elements The term *mens rea* covers different subjective elements in order to distinguish relative degrees of fault, reflecting a difference in the reproach directed against the defendant. The exactly required *mens rea* standard may vary from crime to crime, but generally the more serious crimes require the strict *intention* requirement, while less serious offenses require a less culpable state of mind like *negligence*.

> Take for example homicide. Homicide can be committed intentionally or by negligence. It's reasonable that someone who really wants the death of the victim is considered more culpable than someone who causes the death of another by his carelessness.

Accordingly, people can be punished much more severely for intentional crimes than for negligence crimes.

Regarding the demarcation of the different subjective elements, the continental civil law systems, such as those of Germany and the Netherlands, distinguish only

two major kinds of *mens rea*: intention and negligence. The English framework includes a third subjective element in between intention and negligence, which is called recklessness. Recklessness covers dangerous risk taking and bridges the gap between the most serious and the lowest degree of *mens rea*. As we will see below, civil law systems bridge this gap by broadening the traditional concepts of intention and negligence.

7.6.1 Intention

Intention (or *dolus* in Latin) is considered the most serious kind of *mens rea* in all legal systems. Intention consists of knowing and wanting. Accordingly, the elements of intention can be distinguished in a cognitive part, on one hand, and a volitional part, on the other. Both elements are required, but depending on which of those aspects dominates, we can distinguish two main forms of intention: direct intent (*dolus directus*) and indirect intent (*dolus indirectus*).

Direct Intent This form of intent is characterized by a strong volitional element, where the consequence of an intention is actually desired. It is what we would consider to be intentional conduct in an everyday meaning.

> For example, John shoots at Mike with a firearm because he wants to kill Mike. Whether he succeeds or not—John may happen to be a poor shooter, or the shot may not be lethal—John *desires* the death of Mike and is therefore acting with direct intent. The focus is on the will of the agent to bring about a certain result. And if Mike would as a matter of fact survive his wounds, John would still be liable for an attempt to homicide (see for attempt Sect. 7.8).

Indirect Intent By contrast, indirect intent is characterized by a strong cognitive aspect and exists where the agent *knows* his conduct will *almost certainly* bring about the result, which he does not actually desire or primarily aim at.

> For example, John burns down his villa in order to collect the insurance money for the building, while knowing that his 90 year old grandmother is still upstairs sleeping in her bedroom. John may not actually want the death of his grandmother—it is not his purpose to kill her—but her death is nevertheless an almost certain side-effect of his actions. Therefore, John directly intends the arson and indirectly intends to kill his grandmother.

Intent Is Not Motive It is essential to realize that intention is in itself value-neutral and has nothing to do with motive. Intentionally, killing a person refers to exactly that and not to killing because of an additional evil motive. Only in exceptional cases, e.g. hate crimes, is the offense definition drafted in such a manner that intent must relate also to a specific motive, e.g. racism, which confirms that the intent itself is indeed neutral.

> To illustrate the general rule, take the example of Mark who blows up his wife's car to collect the life insurance money. His direct intent is to kill his wife and his motive is purely financial. This is however quite irrelevant to determine the required *mens rea*. He could

have killed his wife for another reason, without this changing his direct intent. Arguably, his motives should be taken into account in the punishment.

Sometimes, motives may even be considered morally praiseworthy.

Take for example the case where a son gives his mother an overdose of sleeping pills, intending to kill her because she is afflicted with terminal cancer which causes her terrible suffering. Some people would say that this man's motive is not bad at all and depending on the legal system it may even be relevant for making the decision on whether or not to prosecute this offence. However, there is no doubt that the son acted with direct intent.

7.6.2 Conditional Intent Versus Recklessness

The most problematic question regarding the required *mens rea* is what we should do with those actors who did not want the result or where it cannot be proven that they knew their conduct would almost certainly bring about the result.

Imagine that John gets involved in a bar fight and in the heat of the moment hits Mike several times on the head with an empty beer bottle. Mike loses consciousness and a few hours later he dies from his injuries. What should we do with John, accused of manslaughter, who argues that he did not want to kill, but merely to injure the victim? In such a case there can be no criminal liability based on direct or indirect intent. Neither would negligence really define John's actual state of mind, which is rather a case of taking a serious risk that the victim will die (as a consequence of being hit with a bottle) than mere carelessness.

An adequate protection of legal interests against dangerous risk taking demands an additional subjective element in between negligence and (in)direct intention. Most continental legal systems have solved this problem by distinguishing a third type of intention next to direct and indirect intent, called conditional intent (*dolus eventualis*).

Conditional Intent This form of intent can be defined as the conscious acceptance of a possible risk. *Dolus eventualis* is thus said to consist of

1) a cognitive element of awareness of a risk, and
2) a volitional element of accepting the possibility that this risk would materialize.

This lowest form of intention differs considerably in culpability in comparison to the other two forms, as the agent only knows about a risk that may materialize but takes this risk for granted and acts anyway.

Think again of the case described in the introduction. Although John is in the end unsuccessful, his direct intent is definitely to kill Markus M. He does not want the death of the actual victim, Mrs. M., neither does he know that it is almost certain that she would eat and die from the poisoned cake. Nevertheless, he is aware of the risk and accepts the possible but undesired consequence of Mrs. M's death.

Although the concept of conditional intent is similar in Dutch and German laws, the two legal systems differ in the degree of likelihood necessary for conditional

intent. In Germany, almost any likelihood suffices but small chances are considered not to be accepted by the defendant and therefore negate the *dolus eventualis*. In the Netherlands, the chance that the risk will materialize must be considerable. This different threshold may lead to a significant change in outcomes.

Recklessness Common law systems, such as the English system, do not know the concept of conditional intent. They tend to apply a separate *mens rea* requirement for risk taking, in between intent and negligence, called recklessness. Recklessness denotes the conscious taking of an unjustified risk.

An important difference between conditional intent and recklessness is that the latter does not require the volitional element of acceptance. It only needs to be proven that the defendant was aware of a risk, which is, in the circumstances known to him, unreasonable to take. Whereas conditional intent focuses on the *attitude* of the defendant (accepting the risk or taking it for granted), recklessness focuses on what he knew, his *awareness*. Cases of risk taking that would not lead in continental legal systems to a liability based on conditional intent could therefore lead to reckless liability in England.

For instance, take again the example of the two construction workers who dig a hole and fail to take appropriate safety measures. If they omit to do this while believing that no one would fall in the pit and someone gets injured anyways, this could in England be considered reckless behavior. However, in Germany or the Netherlands, this bad risk taxation can hardly be defined as conditional intent. What is lacking here is the volitional element of *dolus eventualis*, i.e. the acceptance of the risk. In other words, only if they would have reconciled themselves with the risk that someone could get hurt—instead of just believing nothing bad would happen—would there be conditional intent. Now, according to Dutch and German laws, there is only a form of negligence.

7.6.3 Negligence

Negligence (*culpa*) is the most normative form of *mens rea* and is primarily based on a violation of the required duty of care that causes a result prohibited by criminal law. Negligence may be expressed in many different ways. The use of terms as "carelessness" and "lack of due care" or "lack of reasonable care" indicate that negligence is required as a condition for criminal liability.

Conscious and Unconscious Negligence Most continental legal systems distinguish between conscious and unconscious deviation from the required duty of care. When the agent wrongfully does not consider the consequences of his conduct, this is called unconscious negligence. The agent is not conscious of a risk, but he should and could have been aware of it.

By contrast, when the agent is aware of a risk but assumes that the result will not occur, this is called conscious negligence. This may sound a lot like conditional intent, but the main difference is the agent's attitude towards the risk; in case of "mere" consciousness negligence, the agent is conscious of the risk but nevertheless trusts in the good outcome. He does not take this favorable outcome for granted but still thinks everything will be all right.

Negligence in English Law Since English law already accepts a third form of *mens rea*, called "recklessness," and distinguishes recklessness from negligence in the form of awareness of the risk, it does not recognize a concept such as "conscious negligence." Negligence in England is always unconscious or inadvertent negligence, as it reflects a culpable *failure to be aware* of the unreasonable risk entailed in one's conduct. This means that cases of risk taking that in the Netherlands and Germany would lead to a liability based on conscious negligence could lead to liability for recklessness in England.

> The above example of the construction workers illustrated this. Their conscious deviation of the required standard of care amounts to recklessness in England and conscious negligence in the civil law systems.

Keeping in mind the above comparison of *dolus eventualis* with recklessness, we may conclude that recklessness may cover both cases of conditional intent and conscious negligence.

> It is interesting to note that negligence offences are not that popular in the English system, the main exception being the offence of gross negligence manslaughter. Not even five percent of all offences are crimes of negligence, while on the continent most intentional offences have a negligent counterpart. In the traditional English view negligence is not even considered a genuine form of *mens rea*, i.e. a cognitive state of mind, but is rather a failure to comply with a standard of conduct. In Germany and the Netherlands negligence is much more popular because these legal systems only operate with two kinds of *mens rea*. If intent cannot be proven, negligence functions as a safety net. In England there is less need for negligence liability due to the concept of recklessness covering cases that are labeled as conscious negligence on the continent.

7.7 Justifications and Excuses

Even if it is clear that a person's conduct fits the definition of an offense, the question may come up whether he is liable to be convicted for that offense. Criminal law provides certain circumstances (defenses) that take away the criminal liability of the perpetrator. In general we distinguish between justifications and excuses. This dichotomy is widely accepted in the continental legal systems and is also becoming more important in England.

> Whereas two decades ago, English law still appeared to lack interest in the distinction for want of practical relevance, the conceptual division between justifications and excuses has gained increasing popularity.

Negating Wrongfulness and Blameworthiness The most fundamental rationale of the distinction is that a justification negates the wrongfulness of the act, whereas an excuse negates the blameworthiness of the agent. This clearly coincides with the second and third tiers of the tripartite structure of a crime (see again Sect. 7.4.2). The dichotomy of justifications and excuses enables a nuanced communication regarding the reason why the defendant should not be held criminally liable. Whereas the acceptance of a justification denies that what the defendant did was wrongful in the eyes of the legal order, the acceptance of an excuse makes clear that what he did was wrong but that he cannot be personally blamed for his conduct.

Criminal law recognizes a wide range of justifications and excuses that can be put forward by the defendant. In this paragraph, we only briefly discuss the justification of self-defense and the excuse of insanity.

7.7.1 Self-defense

The paradigmatic justification is self-defense, also called necessary defense. Illustrative is the following legal definition of self-defense in Section 32 of the German Criminal Code:

> (1) He who commits an act which is required as necessary defense, does not act unlawfully.
> (2) Necessary defense is the defense which is required in order to fend off an imminent unlawful assault from oneself or another.

Imminent and Unlawful Attack Despite differences in development, most legal systems distinguish similar criteria for self-defense. The first requirement is that there is an imminent and unlawful attack.

The requirement of imminence means that the defendant cannot wait any longer for the official authorities to protect his interest. The difficulty lies in determining the limits of this temporal element. On one hand, self-defense may only be performed at its earliest when danger is already close (no preemptive strike). On the other hand, it may be performed only as long as the attack continues; otherwise, it would be retaliation.

The requirement that the attack was unlawful expresses that self-defense is really a fight of right against wrong. It serves to exclude from the defense, for example, situations wherein the perpetrator is being arrested by the police.

The defense must of course pertain to a legitimate interest, such as a person's life, liberty, body, and property. It is important to note that the legal interests of a third party may also be defended. Necessary defense is therefore perhaps a better label for this justification than *self*-defense.

Necessity A second requirement for justification on the basis of self-defense is that the defense must be a capable and necessary means to repel the attack. The use of force in self-defense seems to be only necessary when there are no reasonable alternatives, such as firing a warning shot into the air. Generally speaking, this also implies that if there is a possibility to retreat or to get help, one should use it.

> Imagine a situation where John is attacked at his door by his angry neighbor. Instead of hitting his aggressor, he should simply close the door.

Proportionality This third requirement assesses the relationship between the offense committed and the amount of harm likely to be suffered by the defendant if he had not intervened with force. It is about weighing the interests of the aggressor against those of the defendant. In principle, the least intrusive means that are still effective should be chosen, taking into account all the circumstances, such as the nature of the force used and the seriousness of the evil to be prevented.

> The person who shoots dead a pickpocket who just took his wallet can normally not invoke justified self-defense because shooting the pickpocket dead is not proportional to stealing a wallet.

It is however not required that the defensive force must be exactly in proportion with the attack. As long as the force used was not a *disproportionate* response to the attack, the defendant will be justified. This can be grounded in the reproach that can be made against the aggressor and because the defendant cannot be expected to make a perfect weighing of interests in an urgent situation.

7.7.2 Insanity

The most popular excuse is insanity. Article 39 of the Dutch Criminal Code gives a good illustration of this defense:

> He who commits an act for which he cannot be held responsible by reason of a defective development or medical disorder of his mental capacities is not criminally liable.

Rationale of the Defense The main rationale of the insanity defense is that it guarantees that those who are not responsible for their actions are not punishable. In all legal systems, the insane defendant will therefore be compulsorily admitted to and/or treated in a mental hospital. By framing insanity as an excuse, the state may impose measures upon these perpetrators of wrongful acts. As long as the danger remains and treatment is necessary, the defendant can be detained in a mental hospital. This brings about the fact that by pleading an insanity defense, the defendant risks to be deprived of his freedom for an indefinite time. Not surprisingly, most defendants view these measures as a punishment worse than prison.

Requirements The conditions of an insanity defense essentially require that the offense should be attributable to the mental disorder. This means that, first of all, it needs to be established that the defendant was suffering from a relevant mental

disorder at the time when he committed the offense. Almost all disorders that are medically recognized, such as psychoses, neuroses, personality disorders, can qualify under the defense. Second, it is required that the mental disorder has substantially impaired the defendant's capacities to be held responsible. Depending on the legal system, cognitive, evaluative, and volitional capacities can be distinguished. Third, there is the question whether there may be reasons against attributing the offense to the mental disorder, such as prior fault of getting in a situation where the defendant lost his mind. One may think here of drug use or other forms of intoxication leading to a psychosis.

Diminished Capacity In cases where the defendant's capacities have been impaired by the disorder, but not to the extent of legal irresponsibility, courts can decide to take into account the partial impairment of the pertinent capacities as reason for mitigating the punishment. These cases of "diminished capacity" are much more common than the application of the complete classification of insanity.

7.8 Criminal Attempts

So far, we have mainly focused on successful or completed crimes. For instance, the murder victim lies dead on the ground; property has been stolen, damaged, or destroyed. However, under certain conditions, criminal law will also impose punishment for attempts to commit a crime.

> Think again of the case described in the introduction. The suspect in this case wanted to kill his rival Mr. M. but was unsuccessful in his endeavor. Leaving liability issues for the death of the wife aside, it would seem unacceptable were Mr. M. to escape liability in this situation simply because he failed to reach his goal.

The reasons why criminal law also imposes punishment for attempted crime can be summarized as follows. In the first place, criminal law has clearly become more concerned with the task of preventing crime. The task of preventing future harm however requires that criminal sanctions are already available before the offense has actually been committed. In the second place, the view that people who attempt to commit a crime but fail should not escape criminal liability is corroborated if one takes into consideration that in regard to moral culpability, there seems to be no difference between a person who attempts to bring about the prohibited result and fails and a person who succeeds. They have both manifested their willingness to break the law and should therefore be punished.

Criminal Intent Generally speaking, attempts can be viewed as cases of failure. A burglar is apprehended by the police before he can break into a house. The intended victim, Mr. M., is unharmed by the poisonous cake of John B. All these cases of failed criminal behavior are candidates for attempt liability. So, at a more abstract

level, criminal attempts can be conceived as conduct carried out with the intent to commit a crime but that fails to achieve the envisaged result.

The cardinal question for legal theory in the realm of attempt liability is how close the offense must have come to completion in order for liability of the perpetrator to be warranted. The problem with criminal attempts is that the conduct giving rise to liability is often innocuous from an objective point of view. How can we determine whether a person walking towards a barn carrying a newspaper under his arm and a lighter in his pocket is an arsonist on his way to the scene of the crime or an innocent civilian who likes to read his newspaper in front of the barn while smoking a cigarette? It would seem that we can only draw a sensible line here by focusing on the intentions of our suspect. Yet this raises other difficulties as criminal liability for attempts would then seem to run the risk of introducing what liberal penal systems abhor the most: the punishment of thoughts. After all, to punish attempts is not so much punishing what an agent has done but rather what he intends to do in the future. To avoid this pitfall, many criminal justice systems have traditionally adopted a rather restrictive approach towards attempt liability.

Protected Legal Interest For one, attempts to commit a crime are often only punishable where the underlying protected legal interest seems significant enough to justify an expansion of criminal liability.

> For instance, the penal codes or statutes of Germany, the Netherlands and England and Wales generally confine attempt liability to serious (intentional) crimes, excluding attempt liability for misdemeanors.

Border Between Mere Preparation and Criminal Attempt Likewise, courts have traditionally devoted a large amount of case law to determine the precise border between merely preparatory actions, which are generally not punishable, and criminal attempts.

English Approach For example, in England, pursuant to Section 1 of the 1981 Criminal Attempts Act a person will incur liability if with intent to commit an offence he commits an act which is "more than merely preparatory".

The courts have traditionally interpreted the requirement of more than merely preparatory actions narrowly. In R v Geddes the defendant was for instance found waiting in a toilet of a boy's school, equipped with a knife, lengths of ropes and masking tape, strongly suggesting an intent to kidnap. However, as the man had not yet approached a boy the court held that the defendant had not yet committed more than merely preparatory actions and acquitted the defendant.

Dutch Approach In comparison Article 45 of the Dutch Criminal Code requires that the perpetrator's intentions have manifested themselves in the initiation of the execution of the offence. In assessing this, the courts pay particular attention to objective criteria and the question whether the outward manifestation of the

perpetrator's conduct can be considered to be aimed at the completion of the offence.

In a pertinent case the defendants were arrested in a stolen car with forged license plates in front of an exchange office. They were wearing wigs and the police also found guns and handcuffs inside the car. However, the Supreme Court acquitted the defendants as the outward manifestation of their conduct (sitting in a car, wearing wigs) could not be considered to be aimed at the completion of the offence yet.

German Approach Finally, Section 22 of the German Criminal Code holds that attempt liability will arise once the perpetrator, according to his conception of the plan, takes immediate steps towards the completion of the offence. Notice that in German law the subjective conception of the perpetrator as to what exactly he is doing seems to carry more weight than for instance in England and the Netherlands. As a test German courts have developed the so-called "Here we go!" threshold. In assessing liability they ask if according to the plans of the perpetrator he had already begun to engage in the crime proper and has subjectively transgressed the "Here we go stage".

In a pertinent case the defendants had agreed to rob the owner of a petrol station. They drove to his house and rang the doorbell, gun in hand and wearing ski masks. However, the door remained closed and after a neighbor had spotted them, they abandoned the attempt. The Supreme Court, applying the aforementioned formula convicted the defendants of attempted robbery, as they had subjectively transgressed the "Here we go" threshold.

7.9 Criminal Substantive Law and Criminal Procedural Law

The rules of substantive criminal law determine the scope of criminal liability, the conducts to be punished, and the punishment for each. What then if the criminal law is violated? The answer is straightforward: the culprit will be punished for the misdeed he committed. However, establishing when someone is a culprit is not easy.

> Take the example opening this chapter: the murderer is clearly Mr. John B. but at first the police believe that it was Mr. M. who poisoned his wife and they pursue this initial intuition. Were it not for the subsequent trial, the wrong man would have been convicted.

Convicting an individual for a crime is a serious matter, giving the harsh consequences it bears on a man's life in terms of punishment and social stigma. This is why a decision of guilt must be taken only after the most careful assessment. The function of criminal procedure is not solely to convict the guilty but equally, if not predominantly, to distinguish the innocent from the guilty. Procedural rules

identify the steps for accurately establishing if criminal law was breached and if an individual (the accused) can be deemed culpable for the breach and consequently punished.

Just like its civil counterpart, the criminal process culminates in a decision taken by a judge on the evidence available. However, the interests at stake in a criminal process are of far greater importance than in civil litigations: they include both the dignity, reputation, and often the liberty of a person and also the interest of society in a secure and crime-free community.

State Involvement Since it is the entire society that bears an interest in the prosecution and punishment of crimes and criminals, the state is directly involved in the criminal process. At its origin, the criminal process was an action brought by an alleged victim against an alleged perpetrator. However, as time went by, all systems evolved toward a centralized system of state prosecution, where the state authorities are given the powers to investigate and act against the alleged offenders.

> However, in some countries, e.g. England, Spain, Germany, it is still possible for a victim to bring a private criminal prosecution.

This happened for different reasons. The first reason, based on the assumption that a crime always offends and threatens the society as a whole, is that the monarchs and the citizens felt the need that the essential interest of a secure society should not be not left in the hands of single untrained individuals.

The second reason is that the array of punishable offenses widened over time to include crimes that offend the state at large and not just one of its individuals. This includes crimes against public order, crimes against the economy, and crimes against the environment.

The last reason is that private victims often did not have the resources to take up the task of investigating and prosecuting their offenders.

State Powers In order to discover crimes, the state authorities are given a significant amount of power. The criminal process entails a larger exercise of coercive and intrusive powers than its civil counterpart. Discovering crimes and criminals is essential to ensure the well-being and tranquility of society, but crimes are not always immediately visible. It is for this reason that the powers conferred by the state to its competent authorities are larger and more pervasive than those available to any private civil litigants. This triggers a tension unknown to civil proceedings: the tension between security and liberty or, put in other terms, between crime control and protection of rights. The coercive and intrusive powers given to state authorities to discover and prosecute crimes encroach upon the liberties of individuals, whether or not they are suspected of a crime.

> For instance, home searches, interceptions of communications, surveillance measures restricts the privacy of their targets. Arrests and personal searches encroach upon the personal liberty of suspects.

The criminal process carries a natural imbalance because at the earlier stage of the proceedings, one of the two sides (the prosecution) is given a wider array of powers to pursue its goals than the opposing party (the accused). In most, if not all, countries, there are some coercive/intrusive investigative means that are available only to state authorities and not to private individuals. This is more or less inevitable because state authorities need to discover crimes. Furthermore, the criminal investigations often start against unknown individuals, simply on the suspicion of a crime, and this requires that state authorities be given the power to acquire knowledge of the alleged crime before the accused is identified. The structure of the criminal process is of course intended to remedy this natural imbalance between parties as much as possible, trying to ensure that the defense is not put at a disadvantage. Hence, it comes as no surprise that another difference between civil and criminal processes is in their basic structure.

7.10 The Basic Structure of the Criminal Process

Although criminal procedure differs significantly from country to country, it is possible to observe a general common skeleton of the criminal process. The criminal process displays two main stages: the investigation (or pretrial) phase and the trial phase. There can be intermediate steps between the investigations and the trial (e.g., preliminary hearings or committal hearings); the trial phase can be followed by one or more instances of appeal. But everywhere the core of criminal proceedings is about the division between investigations and trial, a bipartition that has no equivalent in civil proceedings.

7.10.1 Investigations

The investigations aim at discovering crimes. Once the suspicion of a crime comes to the attention of the law enforcement authorities, they conduct investigations in order to find out if an offense has been committed and unveil all relevant circumstances (the author, the *actus reus*, the *mens rea*, mitigating or aggravating factors). The police has everywhere the primary role in the investigations, but in several systems it acts autonomously while in others under the direction and supervision of the public prosecutor. Some continental countries still provide, in some cases, for an investigating judge, who is in charge of leading the investigations (e.g., France, Belgium, and the Netherlands). State authorities can take different investigative measures in order to shed light on the original suspicion: questioning of suspects and witnesses, searches, interceptions of communications (wiretappings), scientific examinations, etc. If the state authorities deem the original suspicion to be unfounded, the case is dismissed. If they instead come to the reasoned belief that a crime has been perpetrated, a formal allegation is drafted (indictment) and the case is taken to trial, where the hypothesis of guilt built by the investigators is tested.

7.10.2 Trial

Purpose of Trial At trial, an impartial court (a single judge, a panel, or a jury) decides whether the accused (more appropriately called "defendant" at this stage) is guilty of the alleged crime(s). In essence, the trial revolves around the statement of facts and law contained in the indictment, and it must answer the following question: is that statement true or false? If the charge described in the indictment is deemed to be true, the defendant is found guilty and is then sentenced; if it is found to be false, the defendant is acquitted. The decision is taken on the evidence available, which must be carefully assessed in its probative value.

Public Trial Save for a few exceptions, the trial is public. According to modern standards, justice must not only be done, but it must also be seen to be done. The publicity of the trial constitutes a prevention of abuses; it is a form of social control on the criminal process in that it induces self-restraint on the parties and adjudicators and allows society to appreciate the correctness of the final decision.

Balance Between Parties The trial also serves as a remedy to the imbalance of powers between the state and the individual during the investigations. During the investigations, most of the evidence is collected in the absence of the suspect and sometimes the suspect is even unaware that he is under inquiry. While during the investigations the suspect has little or no opportunity to oppose the prosecution's thesis, at trial the accused has a possibility to properly rebut the allegations by producing evidence and arguments in her favor. A proper defense requires that defendants have clear knowledge of the allegations brought against them and of the evidence on which they are grounded and that they be given an adequate chance to discredit the prosecution's proposition. At trial, the accused can challenge the prosecution with equality of arms.

7.11 Adversarial or Inquisitorial?

Apart from a general skeleton, the systems of criminal justice differ from state to state. These differences reflect the historical roots, political and socioeconomic structures, and cultural traditions of the national states. Several attempts have been made to classify the different systems into homogeneous groups. A popular distinction between procedural systems identifies two major models, corresponding to two legal traditions: the adversarial or accusatorial systems and the inquisitorial or nonadversarial systems. While the Anglo-American systems of the common law tradition belong to the adversarial family, the civil law systems of Continental Europe are by contrast usually labeled as inquisitorial.

The distinction between adversarial and inquisitorial systems is also discussed in Sect. 13.4.7.1.

The Term "Inquisitorial" The term "inquisitorial" could sound surprising. The inquisitorial system of medieval times was characterized by a large use of torture and no proper distinction between investigations and trial. This is no longer the case in Europe nowadays. The reason why some systems are still labeled as inquisitorial is that they supposedly retain some features of the old inquisitorial system, particularly the characteristic of being structured as an official inquiry carried out by an impartial judge. In fact, the opposition between adversarial and inquisitorial systems reflects the idea that the adversarial model consists in a dispute between parties, while the nonadversarial model does not. In the first mode of proceeding, the parties are in charge of bringing the evidence and offering the arguments to persuade a passive judge. In the second, it is an impartial judge who takes an active part, by leading the proceedings and collecting all the relevant evidence.

7.11.1 Historical Patterns

Adversarial The dichotomy is built around some selected historical features of civil law and common law countries. In this regard, the traditional common law systems are taken to be characterized by the fact that the prosecution was mostly left to the initiative of a private accuser (a citizen, often the victim) who would conduct private investigations and bring the case against a defendant in front of a jury of twelve laymen. The trial consisted in a battle of evidence and arguments between the private accuser and the private defendant in front of the jury. Witnesses were cross-examined directly by the parties. Evidence collected out of court during the investigations was inadmissible, save for some limited exceptions. The jury remained passive and returned a verdict of innocence/guilt without giving reasons for it.

Inquisitorial By contrast, the traditional inquisitorial continental system would be characterized by the fact that the state authorities were charged with the duty to investigate on any suspicion of a crime. The investigations were conducted in a formal and official manner by a career judge, called the investigating judge. All the results of the investigations were recorded in a *dossier*, which the investigative judge would then hand over to the trial court, composed of a panel of professional judges. At trial, the parties had the right to bring additional evidence and to present their arguments. However, since the trial court could rely on the investigative evidence previously obtained and could even collect further evidence on its own motion, the role of the parties was marginal. The judge would even conduct the examination of witnesses, while the parties could at most suggest some questions to be put to the witnesses. The trial court gave reasons for its decisions.

7.11.2 Quest for Truth

Given this historical reconstruction, legal scholars build their adversarial and nonadversarial dichotomy by emphasizing one or more of the contrasting features of the two models. Certainly, the watershed cannot be seen in a different tendency of the two systems towards the discovery of the truth. It would be wrong to characterize the inquisitorial system as the only model striving for the truth, with the adversarial system simply aiming at the solution of a dispute. While it leaves the responsibility to adduce the evidence and make their arguments in court to the parties, this does not make the adversarial model of criminal justice similar to a game, where the aim is winning rather than finding out what really happened. Both models attach importance to finding the truth of the criminal allegations. Adversarial and inquisitorial systems are merely based on different ways to discover the truth; they display two different fact-finding logic. An inquisitorial system empowers a neutral investigator to collect all relevant evidence available, while an adversarial system relies on the agonistic approach of the parties and on the assumption that the clash of opposing views will show which of the two versions is more credible. The risk that the parties of an adversarial dispute will not offer the judge some crucial information to solve the case is equivalent to the risk that the active judge of the inquisitorial system might overlook some crucial information. In the adversarial model, the parties will present evidence and arguments favorable to their position, but they will equally adduce all the available elements against the reconstruction of the other party. Both models equally strive for the discovery of the truth, and they both consider it a miscarriage of justice when the outcome of the criminal process reaches a factual conclusion that later proves different from what happened in reality.

7.11.3 Hybrid Contemporary Systems

Furthermore, it should be kept in mind that the opposition between adversarial and inquisitorial systems can hardly be used to characterize contemporary systems. Several of the historical traits of these systems have now disappeared or have been mitigated. Common law countries have centralized the duty of prosecution on state authorities, and private prosecution remains only a theoretical possibility. In several continental countries, the investigative judge has been abolished, and where he survived, his role is mostly limited to the investigations on the most serious crimes. Nowadays, in most continental countries, the burden of the investigations for the majority of crimes lies on the public prosecutor and the police.

Juries Some continental countries have introduced jury systems or the cross-examination of witnesses, and in the majority of them a conviction cannot be based on investigative evidence alone. Meanwhile, a mandatory jury system is in place in England only for the most serious offenses (so-called indictable offenses), while for the others it has been abolished or is left to the choice of the defendant.

Even the traditional common law rule that prohibits the use at trial of investigative evidence has been relaxed lately.

Although the classic dichotomy between inquisitorial and adversarial systems still retains some importance for understanding certain cultural and theoretical features of each of the two traditions (common law v. civil law), it is important to acknowledge that

> the borrowings between the two have been so extensive that it is no longer possible to classify any of the criminal justice systems in Western Europe as wholly accusatorial or wholly inquisitorial (JR Spencer).

7.11.4 Progressive Convergence

Today, the opposition between the adversarial model of a dispute and the inquisitorial model of official inquiry represents two poles of a theoretical spectrum. Each national system can be characterized as being more or less adversarial, depending on the role that the parties have in the trial compared to the position of the judge and on the importance played by the findings of prior investigations on the outcome of the trial.

Identical Problems The progressive convergence of procedural systems, particularly in Europe, is explained by different factors. First, the European national criminal justice systems work within a similar societal background and are thus confronted with identical problems in coping with crime. Not surprisingly, many countries share common trends in the development of their criminal proceedings, which reflect the common challenges that these countries face.

> One example is the growing popularity of pre-trial case disposals, such as the mechanisms of plea-bargaining, where the defendant agrees to the application of a lesser penalty to close the case before the trial.

Supranational Law Furthermore, an important move toward harmonization derives from supranational law. After the Second World War, a number of international instruments have entered into force, with a view to ensuring a better protection of human rights. These instruments place significant limitations on the possibility for states to freely shape their criminal justice systems, and they have led to a growing convergence of the different national procedures. All European countries are bound by fundamental human rights embodied in international conventions, particularly in the European Convention on Human Rights (ECHR). The latter instrument has proved to be particularly stringent, thanks to the enforcement assured to its provisions by the European Court of Human Rights (ECtHR). The Convention and the large body of ECtHR case law have had a significant impact on the shape of national systems, even to the extent that they have created a blueprint of European principles of the criminal process.

7.12 Basic Principles of Criminal Justice Systems, the Presumption of Innocence

7.12.1 Tension Between Security and Liberty

As mentioned, the criminal process revolves around a continuous tension between security (of the society as a whole) and liberty (of the individuals within society). It constantly strives to find a balance between these conflicting interests. The more emphasis is put on crime control (coping with a high crime rate or reducing the crime rate), the fewer safeguards will be provided to the individuals. If the main accent is put on the need to ensure a due process that minimally restricts the rights of people, the repression of crime might become less efficient. To some extent, rights and safeguards are time consuming: by requiring the state authorities to act under a higher number of constraints, they slow down the criminal process and reduce the number of trials and convictions. Moreover, by placing a series of burdens and hurdles on the actions of the prosecuting authorities, the procedural safeguards increase the chance that a guilty individual may escape punishment. At the same time, they reduce the likelihood of an error against the defendant and limit the impact of the criminal process on the life of possibly innocent individuals.

The ideal solution would be to protect the rights of individuals and the accuracy of the fact-finding process adequately without sacrificing the efficiency and the effectiveness of the repression of crimes. In real life, it is however impossible to have both, hence the traditional dilemma: is it preferable that ten guilty persons escape or that one innocent suffers? The answer to this question is offered by a general principle of liberal tradition that is embraced by all international covenants, explicitly affirmed in Article 6 Section 2 ECHR and largely accepted by all European systems: the presumption of innocence.

7.12.2 Presumption of Innocence

The presumption of innocence is the cornerstone of the criminal process. An individual is considered innocent and must be treated as such until a decision of guilt is passed against him. According to the ECHR, the presumption ceases when a conviction in first instance is passed against the individual. In several continental countries, however, the presumption is applicable even during the appellate stages until the defendant has exhausted all appellate remedies (with the sentence being suspended during the appeal stage).

Not a Prediction of Outcome Usually, in law, a presumption is "an assumption by which the finding of a fact gives rise to existence of a presumed fact." It is usually based on the observation of what routinely happens in society.

> For instance, the husband of a woman is usually presumed to be the biological father of the baby born during the marriage, unless the opposite is proved.

The presumption of innocence is a different kind of presumption. It is not true that usually an accused is later found innocent. In other words, the presumption of innocence is not created upon an inference of what statistically happens in criminal proceedings. If one were to craft a presumption based on the most frequent course of events in a criminal process, it would more probably be a presumption of guilt. When a person is accused of a crime and brought to trial, it is more often the case that the person is found guilty. As a prediction of outcome, the presumption of guilt is probably a better presumption than the presumption of innocence.

A Purely Normative Command The presumption of innocence is not a prediction of outcome. It is instead a purely normative command that is created exactly for the purpose to counterbalance and neutralize the more natural assumption of guilt arising out of criminal proceedings. The presumption of innocence demands that a person is treated and considered as innocent until an accurate finding of guilt has been made. The mere fact that someone is a suspect or is brought to trial should in no way authorize to restrict his or her liberty. Likewise, the mere fact that a person is a suspect does not authorize the authorities to treat that person differently from any other nonaccused individuals. The presumption of innocence is also intended to remedy the imbalance between the parties in the early stage of the criminal process. As seen above, during the investigations, the state authorities are given strong powers to discover crimes and offenders and may act under a veil of secrecy. There is no equality of arms between the two conflicting sides during the investigations. The presumption of innocence tries to cure this imbalance in two ways:

1. by establishing that in principle a person's liberty is not unduly prejudiced by the investigative action and findings, and
2. by imposing that prosecuting authorities reach a higher standard of proof in order to obtain a conviction.

The presumption of innocence is the quintessence of the criminal process. The majority of the procedural safeguards can be construed as corollaries of that presumption. Even the right to a fair criminal process and the right to defend oneself at all stages of the proceedings (see Article 6 ECHR) can be derived from the presumption of innocence.

In Dubio Pro Reo There are two direct corollaries of the presumption of innocence. The first consists in a procedural rule applicable at the trial stage in the judgement against the defendant: the defendant can be considered guilty only if his guilt has been proved beyond reasonable doubt (in dubio pro reo). As a consequence, the prosecution bears the burden to prove all of the elements of the alleged offense. This is significantly different from what happens in civil proceedings. A

civil dispute is usually solved on a balance of probabilities: the judge adjudicates the case in favor of the party whose proposition appears more probable, even if it is only slightly more probable. The rule in criminal trials is instead that the thesis of the public prosecutor must be highly probable if a verdict of guilt is to be passed. The trial judge must be convinced that there is no likely alternative to the way in which the prosecutor portrayed the alleged facts.

Pretrial Detention as an Exception The second corollary of the presumption of innocence is that the personal liberty of a suspect cannot be unduly restricted before a verdict of guilt is passed. This does not mean that the personal liberty of the suspect can never be limited before the trial decision. Pretrial detention is possible in some circumstances. The suspect can be arrested during the investigations. For instance, if the police catches someone red-handed, they arrest him. The police may also decide that they want to apprehend the suspect in order to interview him out of fear that he might flee or commit dangerous acts. What the presumption of innocence commands is that a person should not be kept in detention simply because he is suspected of a crime. The restriction of the suspect's liberty should be limited to a minimum, confined to those situations where it is essential for ensuring a proper course of the proceedings or avoiding a danger to society and assisted by strong safeguards.

7.13 Fair Trial and Proportionality

Fair Trial Closely tied to the presumption of innocence is the principle of fair trial. Convicting the guilty cannot come at any price. The function of the criminal process is not just to reach a correct verdict but also to do so in a manner that generates public confidence in the court's work. Every accused in criminal trial shall have his case adjudicated in a just manner. Under the label of "fair trial" (or "due process") fall a number of safeguards whose array varies from country to country. The common core of the principle includes the right of the accused to a public trial in front of an independent and impartial judge and the right to defense. The accused must be given the opportunity to properly oppose the allegations against him.

Lawyer's Assistance This entails the right to receive legal assistance from a counsel. The criminal trial is a very technical matter: there are fine-grained legal distinctions that are not easy to grasp and can be crucial to the outcome of the case. Building an effective defensive strategy compatible with the procedural rules requires adequate knowledge and skills; finding evidence, questioning witnesses, addressing and persuading the courts are all activities that require experience and preparation. Hence, all defendants can elicit a counsel to assist them in the preparation and conduction of the defense.

Right to Silence The right to defend oneself also includes the right not to cooperate with prosecuting authorities: the accused has a right to remain silent, which means that he should not be compelled (by law or by the prosecuting authorities) to make statements that could turn out to be detrimental to his case.

Cross-Examination The right to defense incorporates also the possibility to discredit the evidence offered by the prosecution by confronting the incriminating witnesses. In the example at the beginning of this chapter, it was the cross-examination of the counsel combined with the introduction of further evidence that allowed the innocent Mr M. to escape an unjust conviction.

Fair Investigations The fair trial safeguards are also applicable during the investigative stage, at least insofar as this is compatible with that earlier phase. In particular, the rights to legal assistance and to remain silent apply not only to defendants at trial but also to suspects during the investigative phase.

Proportionality The main principle concerning the investigation stage is the principle of "proportionality," which entails that state authorities should not make arbitrary use of their coercive and intrusive powers.

> For instance, searching a house in a case of drunk driving is clearly disproportionate just like searching all the houses of a city to investigate a robbery. Widespread interceptions of telephone conversations should not be tolerated even for discovering serious crimes.

In other words, investigative measures cannot be used lightly or for purposes other than unveiling the elements of a particular offense: given their intrusion upon individual liberties, the investigative means should be rigorously proportionate to the legitimate ends. Coercive or intrusive action should be allowed only when and insofar as it is strictly necessary to investigate a specific offense.

The principle of proportionality is often a component of the principle of legality (in procedural law), according to which it is up to the law to set out the conditions under which state authorities are allowed to take investigative measures. In many cases, however, it also operates as an autonomous principle, respect for which by the investigating authorities can be ensured by subsequent judicial review. This is, for instance, the case with coercive measures (like pretrial detention) and, in some countries, even with intrusive investigative measures (like interception of communications): the person who suffered the deprivation of liberty or the intrusion can apply to a judicial authority in order to have the restriction scrutinized as to its proportionality with the investigative need and the standard of human rights protection.

Conclusion

In this chapter, we have identified some basic concepts of substantive and procedural criminal laws. We have seen that at the outset of any discussion regarding criminal law, a decision needs to be made as to which forms of

conduct rightly ought to be considered criminal and how the subsequent imposition of punishment can be justified (in a given society). The choices made on this fundamental level will strongly determine the general attitude and stringency of a criminal justice system. Although every European country has its own legal culture, each system may be understood as a "local" answer to some "universal" questions that constitute the doctrinal foundations of criminal liability.

One of these fundamental questions is how to conceptually relate the objective and subjective elements of a criminal offense, in other words, how to connect the act requirement, which is related to the principle of harm, with the requirement of a specific state of mind, which is related to the principle of guilt. We have seen that common law systems, such as England and Wales, use a bipartite structure of crime, whereas most civil law systems, such as Germany and the Netherlands, prefer three rungs on the ladder of criminal liability. On one hand, this striking difference has definitely its consequences for the categorization of certain concepts, such as blameworthiness, or for the differentiation of defenses; on the other hand, one should not forget that the practical outcomes may not always be that different. Nevertheless, conceptual distinctions are sometimes of great importance as they may reflect fundamentally different choices regarding the conditions of criminal liability. A good example is how the English system uses a more fine-grained tripartite system of fault, instead of merely distinguishing intention from negligence, which has resulted on the continent in often unclear and debatable distinctions between the lowest form of intent and the highest form of negligence.

In the last part of the chapter, we have focused on the enforcement of substantive criminal law through the criminal process. The purpose of the process is to officially establish the guilt of an accused with the related consequences and also to ensure that innocent people are not unduly convicted. We have seen that different legal systems are based on different historical models and cultural traditions. Nevertheless, all systems present a common bipartite structure (investigations and trial), and they share some common general principles. All of the basic principles of the process concern the protection of individuals (suspects, defendants, or third parties) in front of the state's power to enforce criminal law. No matter what function we ascribe to the substantive provisions of criminal law, a democratic state must ensure that the criminal enforcement does not run counter to the liberties of the individuals. A crime-free society with no liberties remains a worse choice than a society affected by crime but able to enjoy its natural freedoms.

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Constitutional Law

8

Aalt Willem Heringa

8.1 State Power Established

8.1.1 Introduction

Law and State The law is strongly connected to the state, on one hand, because the state creates most of the law and, on the other hand, because the state itself is regulated by the law. From a historical point of view, it was the increasingly effective and tightly organized state (whether it was a city-state, a principality, a kingdom, or an empire) that succeeded in imposing law upon its citizens. This trend is illustrated by the development of criminal law as a separate branch of law, next to private law. By prosecuting crimes as offenses against the state (and monopolizing violence and the suppression of crimes) rather than considering them offenses against the victims, states drastically reduced the rates of violence between individual people, clans, and tribes. With this enforced pacification and improved legal certainty, as well as with growing infrastructure, states boosted productivity and facilitated peaceful commerce between people. At the same time, we expect that the state itself be organized and regulated by the law and that rulers exercise their power in accordance with legal norms, rather than arbitrarily.

The branch of law that regulates the state itself is called *constitutional law*. Constitutional law contains rules on the organization of a state, on the powers that its organs possess, and on the relations between these organs (institutional law), and it provides fundamental rights that protect the legal position of the individual against the state (human rights law, judicial review, and, as an offspring, administrative law).

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8.1.1.1 Sources of Constitutional Law

Constitution In most states, the most important of these constitutional rules have been laid down in a central written document. This document is typically called a *constitution*, but it may also carry different names, such as *basic law*, *charter*, or *regulation of state*.

> For example, Article 12(3) of the Irish Constitution provides that the President of Ireland is elected for a term of seven years; Article 12(6) no. 1 stipulates that the President may not be a member of parliament at the same time.

Some states even do without an official written constitution! They do, however, always have a constitution, but the constitutional norms are then exclusively found in ordinary laws, customs, and case laws. The best example is the United Kingdom. Its constitutional norms may be changed by ordinary laws and can therefore be qualified as a "flexible" constitutional model.

However, constitutionally relevant rules are often also found in ordinary laws, in case laws, or in customs.

> Ordinary laws that tend to have constitutional significance are, for example, election laws, rules of procedure of parliaments, laws on the organization of the court system, or laws stipulating the establishment and powers of regional or local governments.

Case Law Case law may be constitutionally relevant where courts lay down rules with a "constitutional" focus, such as the UK doctrine of parliamentary sovereignty or the US doctrine of judicial review, or when courts are called upon to interpret the meaning of the constitution or establish fundamental rules and principles with constitutional significance in practical cases.

> A court might, for example, rule whether a certain authority is legally competent to act in a certain way, or whether a certain law violates human rights. Thus, the US Supreme Court pronounced itself on the question whether the US Congress may pass laws to establish gun-free zones in and around schools, or to restrict the ownership of guns altogether. In the first case, it may be argued that the Constitution does not allow Congress to regulate such issues for the whole country and that they should be resolved by the individual states, meaning that the rules in California are different to those in Arizona. In the second case, it may be argued that a ban on guns violates the individual's right to bear arms as is laid down in the Constitution.

Customs Customs often play a role in the internal proceedings of parliaments, such as the composition of parliamentary committees or the panel of parliamentary chairmen. They may also play a role in the process of government formation.

> In some constitutional monarchies, such as the United Kingdom, the Netherlands or Denmark, the King or Queen will appoint as Prime Minister the person who leads a majority in Parliament, and will not appoint anyone against Parliament's will.

Of course, customary rules differ significantly between states; what is a custom in one state is explicitly regulated in another and may simply not exist in a third.

Entrenchment Because of their fundamental nature, written constitutional documents almost always provide that they can only be amended through difficult, special procedures often involving special majorities. This feature is called "entrenchment," and an entrenched constitution is generally called "rigid." Entrenchment is meant to make changes in the constitution harder to accomplish than changes in ordinary law. As a result, a constitution will reflect a larger majority and be more protective for minorities or minority interests.

> An amendment of the Polish Constitution, for example, requires a two-thirds majority in the lower chamber of Parliament and an absolute majority in the Senate, and in some cases a referendum may be prescribed afterwards to confirm the amendment. Normal laws, by contrast, in principle require a simple majority in the lower chamber, and the senate may usually be overruled if it objects to a law.

8.1.1.2 Three Themes

In this chapter, several topics of constitutional law will be addressed. They will be structured in three major themes. The first theme, "State Power Established," discusses in the remainder of Sect. 8.1 the state and the source of its sovereignty or authority to rule.

The second theme, "State Power Constrained," considers the ways in which the power of the state is curbed; this includes the division of the state's power among its organs (or branches of government) and among its territorial entities, the limits on state action as they result from the protection of human rights, and the power of the judge to determine whether state action is lawful or unlawful. This theme is dealt with in Sect. 8.2.

The third theme, "State Power Democratized," relates to the ways in which the power of the state is exercised or controlled by the people. It is the topic of Sect. 8.3.

8.1.2 Sovereignty

A state is an organization that is able to control a certain territory and the people living in it, both in the sense of defending it against the outside world and in the sense of exercising powers and maintaining law and order inside its own borders. These two capacities are considered to be two aspects of sovereignty, namely *internal sovereignty* and *external sovereignty*. The extent of states' external sovereignty is a central topic for public international law—the branch of law that regulates relations between states (see Chap. 11). The use of the term "sovereignty" is a normative one (relating to the source of state authority and powers), but "sovereignty" also stands for factual control. A state may have sovereign powers but still be hindered from exercising them for reasons of international politics, trade relations, resources, the role of financial markets, or lack of military powers.

8.1.2.1 Internal Sovereignty

A state's internal sovereignty, meanwhile, is foremost a constitutional issue. Sovereignty in that sense is the ultimate source of authority in a particular territory, and it is where the power of the state originates. If an official is able to lawfully impose obligations upon citizens, e.g. the obligation to pay a tax or to perform military service, there must be something that distinguishes the official imposing the obligation from the citizen receiving it. The official must have a right or entitlement to rule. Lower ranking officials such as tax inspectors or policemen will cite the authority they received from their superiors. These superiors act on the basis of regulations, which in turn are enacted on the basis of laws. At some point, there must be an ultimate superior, the source from which all state authorities trace their own power to rule: the sovereign.

> The tax inspector's individual order to pay a tax may, for instance, be based on an administrative regulation on how to issue such orders; the regulation in turn is based on the tax code, which is a general law regulating tax rates; the tax code has been adopted because the constitution allows the lawmaker to impose taxes (see also Sect. 2.2.3). Who, then, made the constitution, and what gave the creator of the constitution the right to empower the lawmaker to impose taxes?

The People Monarchs, such as emperors or kings, may argue that they derive their power from God, including the power to make constitutions if they so decide. An enlightened audience will find such claims implausible, however. In modern times, the idea has gained ground that the ultimate source of authority within a state lies with the people. In many Western constitutions, reference is explicitly made to the people as the origin of the written constitution and as the source of the powers of the state.

> Often the preamble, which is a declaratory introductory statement, makes clear on whose authority a constitution is enacted. The US Constitution's preamble famously starts out with the words: "We, the People…". The French Constitution's preamble also makes explicit that the text is written from the point of view of the people. Other constitutions, such as the one of Bulgaria, contain an article in the text itself which proclaims that all public power emanates from the people.

As a result, in systems that are based on popular sovereignty, the people are bound by laws that are made on the basis of a constitution that was enacted in the name of the people itself.

Secession A major problem in connection with statehood is how to cope with parts of a state that wish to secede and become an independent state of their own.

> Examples in recent history are Kosovo, the Crimea and South Sudan.

Given the demand of internal sovereignty, a state must exercise internal domestic control and possess the power to stop civil unrest and prevent secessionist and other revolutionary movements. This demand is obviously not met if secession is ongoing. In such cases, it depends on the extent and proportionality of the power used by the seceding "state," the legitimacy of the secessionist movement, and

possibly also other arguments of international politics if and how the international community will deal with the recognition of the new state entity. A right to secession may not exist under the domestic law of the land, but secession may eventually still be the effective outcome with international recognition as the result. When a state does not appear to be able to enforce its national constitutional claim to unity and nonsecession, secession and the birth of a new state may be the consequence.

Some civil wars do not lead to the effectuation of secession (the nineteenth century American civil war); some secessions do appear rapidly and without too much force (the Crimea). The latter however is highly disputed in the international community.

Failed States Some states simply do not manage to exercise effective internal control and the monopoly of force. Strictly speaking, they do not meet the criteria of statehood: they are called "failed states."

8.1.2.2 External Sovereignty

The external aspect of sovereignty relates to the mutual relations between states. The basic idea is that a sovereign state is independent of other states and that other states are not authorized to meddle into internal affairs of a sovereign state. The idea that states are sovereign in this sense has been anchored in Article 2, Section 1 of the United Nations Charter, which states:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> The Organization is based on the principle of the sovereign equality of all its Members [. . .].

However, there are examples of states that are (or were) not sovereign in this sense, and which for this reason are sometimes not even called "states," such as Tibet and the states in Eastern Europe at the time that they were still controlled by the Soviet Union.

Several facts and recent developments have jeopardized the classical notion of external sovereignty of states. We will deal with these in Sect. 8.1.4. Before we do, we will mention some other definition-related issues.

Degrees of Statehood Statehood is not an all-or-nothing matter: not all states meet all the criteria to the same extent. Some states are internally weak and have their authority disputed. Sometimes, this even goes so far that we can conclude that there is a situation of anarchy, civil unrest, or even civil war. Some states provide less protection to their citizens than to others or do not (or hardly) provide for internal security or the general interest.

> The Libyan civil war which led to the end of the Gaddafi regime would be a case in point.

As already mentioned, some states are called "failed states," those that lack the basic appearance of what a state should be.

An example would be Somalia in its current situation.

Recognition One possible criterion for statehood is whether a potential state is recognized by the "international community" of states. This would mean that most or all other states engage in diplomatic relations and that the potential state is accepted as a member of an international organization, such as the United Nations. However, we have to be careful here. Sometimes a state can function as a state and exhibit many, if not most, of a state's features but still not be recognized as part of the international community.

An example would be the island of Taiwan, which is not recognized as a separate state because of pressure from China, which claims that Taiwan is part of that country. Kosovo also lacks recognition by quite a few other states.

8.1.3 Nation States

Nations Some states have a very long history; others are of a more recent invention. When it is said that some states have existed for many centuries, this does not mean that their government structures have existed that long. But when people share some common characteristics, such as skin color, language, physical built, etc. and have a (long) common history, it gives them a feeling of a shared past and an identity. Such a group of people is called a *nation*, and a state that is inhabited by such a nation is called a *nation-state*.

Where such unifying factors do not exist spontaneously, states can make an effort to create more unity. A national flag, a national anthem, or a national currency can play a role in this connection. Sometimes states find unity in a hereditary monarchy. In the international sports arena, states are represented by national teams.

Here we can spot differences. The United Kingdom, for instance, has a national anthem and flag, and had a combined Great Britain team for the recent Olympic Games. However, in other sports competitions, teams represent each of the four participating state entities: Northern Ireland, Scotland, Wales and England.

The European Union Many (18) European countries have surrendered their former national currency in favor of the euro. Yet the European Union (EU) is not a state, and neither is the European Monetary Union. They are international organizations, established on the basis of international treaties between the Member States. The EU displays many features of a state, such as the exercise of internal and external powers. The EU has a diplomatic service and the High Representative for Foreign Affairs, and the EU can conclude treaties with other (non-EU) states and international organizations. Internally, the EU has many powers, which have been transferred to it by the Member States. Most significantly, what the EU is lacking

are defense powers and police powers. Moreover, international affairs must be agreed unanimously. State-like features such as a national anthem and a flag do exist but are not laid down in the treaties.

Many feel that the EU cannot be a nation-state since the EU is not founded upon one people. They claim that far-ranging powers and their democratic exercise can best (or only) be organized in a setting of a true state with an identifiable people/nation. Is the EU in itself a sovereign entity? No, since it is not itself the master of its own constitutional development: it is not the master of the treaties. This role is kept by the 28 member states. The EU's powers have been transferred to them by these states and can ultimately, by amending the treaties, be taken back. However, it is accepted that the member states by transferring parts of their sovereign powers, some of them even exclusively, to the EU now share the exercise of their sovereign rights with the EU. Some would therefore argue that the sovereignty of the member-states is now, severely, restricted.

8.1.4 Globalization and International Integration

Sovereignty is an important concept that underpins national constitutional systems, but in reality it may also become something of a fiction in the real life of the modern world. This is to mean that sovereignty formally exists but that the exercise of sovereign rights is factually restricted.

Globalization In some cases, a state may be externally sovereign in the sense of being independent and of not belonging to another state, but its internal will formation may in fact be controlled from the outside, for example by a dominant neighboring state. Yet even apart from such cases, international cooperation and integration between states make it increasingly difficult to argue that all public power in a state emanates from the people or another internal source of sovereignty. International cooperation, and the creation of permanent international organizations that comprise several states, is increasingly necessary. Technological progress in the area of transportation and communication has made it more and more irrelevant where goods and services are produced, a trend captured by the term *globalization*. As people and economies become interconnected as a result, decisions taken in one state may have an impact on the people in another state, people who are not represented in the first state, however.

Food Safety Food safety standards in country A have an impact on the quality of the food available to consumers in country B if A exports its food to B. B's standards do not apply to food producers in A, however. Common food standards may be called for. One may call this an exercise of state sovereignty, since it is a

choice to opt for international collaboration and harmonization or even integration. However, at the same time this choice limits the subsequent policy options.

Crisis The recent economic and financial crisis has also made us aware of the interwoven and mutually dependent nature of financial markets, products, and relations. A crisis in one state has an immediate impact upon other states.

Environment Some issues such as environmental pollution are, by their very nature, cross-border problems, even without globalization.

> Neighboring states are arguably stakeholders when it comes to the assessment of, for instance, the safety of nuclear power plants. In fact, nuclear power plants are often found suspiciously close to the state's border with other states, so that some of the risk gets externalized. After the 2011 nuclear disaster in Fukushima, European governments therefore called for an EU-wide safety test of such facilities.

Human Rights In addition, certain values, notably the protection of human rights, are increasingly perceived to be of universal value irrespective of the preferences of individual states. Thus, cross-border phenomena call for cross-border approaches.

> A state may be subject to international supervision and enforcement in the area of human rights, such as under the European Convention on Human Rights. If it is also a member of the European Union, a state may have to accept regulations that it did not itself choose to enact. See also Chap. 12 on Human Rights.

Voluntarism The most important way to secure the construction whereby the sovereign is not bound by any higher authority is to insist on the principle of unanimity in international relations. Unanimity means that a decision can only be taken with the approval of every participant. As a result, no state is forced to accept anything it did not voluntarily agree to (voluntarism).

Treaties In order to permit the undertaking of rights and obligations with foreign states under these terms, a national constitution may allow the government to sign international agreements while providing that, before they can enter into force, the national parliament must vote on them or the people themselves must approve them in a referendum. If an international agreement would be in conflict with the constitution, the constitution may have to be changed before the approval for such an agreement is given. Thus, even external obligations are legitimized with reference to a sovereign.

> The European Convention on Human Rights is an international treaty between many states; in other words, it is a multilateral treaty. The same is true for the Treaty on European Union. No state has been forced to become a party to these treaties against its will; treaties have been voluntarily approved by each and every Member States.

Still, while unanimity may govern the *conclusion* of international agreements, it may not necessarily govern their subsequent *application*.

> The meaning of the European Convention on Human Rights is at times interpreted by the European Court of Human Rights in ways that the states had not foreseen when they

originally concluded the Convention. The law of the European Union has a stronger effect on national law than the law of other international organizations, because the Union's Court of Justice has held that EU law has a special character and that Member States have limited their sovereignty to create it (see also Sect. 10.6.4.1).

Apart from that, while the Union's treaties require unanimity, the adoption of regulations and directives on the basis of these treaties usually does not. This means that while individual Member States have joined the Union voluntarily, they can be outvoted when actual EU laws are made (see also Sect. 10.3.2). Of course, decision-making by majority instead of unanimity is laid down in the treaties themselves, and had been accepted by all Member States as such.

While some national governments may grumble because they have been outvoted in an international organization that can take decisions by majority, they also tend to complain about the lack of progress in areas still governed by unanimity. In the former case, they suffer because they cannot block decisions; in the latter, they suffer because others can. As a whole, states accept the binding nature of international commitments against their will because they profit from the greater territorial scope, and therefore the larger effect, of such commitments if they are taken internationally rather than nationally. Yet it also means that sovereignty, and the ability to trace back the exercise of public power to the sovereign, such as the people, may be reduced to a romantic concept that applies only in a very formal sense.

Power Differences Finally, there are many power differences between small, weak, or poor states, on one hand, and large, powerful, or rich states, on the other hand, and they are greater than ever before. Whether we like it or not, the US and China have a greater impact on international politics because of their sheer economic size and military power than a small and poor and less-developed state. Apparently, some states are more sovereign than others.

8.2 State Power Constrained

Traditional functions of states include the provision of external defense and an internal police force that can maintain the law. In order to exercise sovereignty effectively, a state must be powerful. It must be able to keep a grip on what the German sociologist Max Weber (1864–1920) called the *monopoly on violence*: only the state can use coercion against individuals. Other organizations may not, and they can be prosecuted as criminal gangs if they do; individuals seeking self-justice to avenge crimes are prosecuted themselves.

The influential English philosopher Thomas Hobbes (1588–1679) famously argued that it takes a Leviathan—a centralized government authority appearing like a terrifying giant—to keep people from inflicting misery upon each other (see also Sect. 14.6). However, nowadays, we expect the state itself to be organized and regulated by the law as well. This is an aspect Hobbes did not emphasize, but later

scholars of liberal humanism and the Enlightenment stressed this point forcefully and successfully.

Absolutism An absolute ruler, or despot, may succeed in imposing law upon his citizens but is essentially lawless himself. In fact, this is the origin of the expression "absolutism": an absolute ruler is *legibus absolutus*, which is Latin for "free from laws." There are no legal constraints upon the absolute ruler, who may regulate, tax, prosecute, torture, and kill his subjects as he pleases: from on-the-spot executions on a whim to veritable genocides. This is still largely true for dictatorships today, and it was certainly true for early states that were able to *impose* laws but that were themselves not *bound by law*.

Over the last century, expectations towards the state have increased. For instance, many of us expect the state to provide protection for the needy, young, and elderly; a clean environment; roads; jobs, decent working conditions, and proper wages; a sewage system; schools; culture; and energy. In response to these increased expectations, states have expanded their activities, and in order to make this possible they needed expanded powers and budgets.

It is a matter of policy, or politics, to what extent and how the existing powers are being used. A state may have the power to intervene in the market and enforce free competition and still consider it unwise and politically inopportune to do so in general or in specific cases. Obviously, some choices have to be made with regard to the tasks that states are to fulfill and with regard to the powers and budgets—and therefore also taxes—that states need for these tasks. How these choices are being made, by whom, and through what procedures are a primary domain of constitutional law.

Constitutional law sometimes even restricts politics from making some choices. For instance, clauses in some European constitutions limit the powers of parliaments to create too big a budget deficit or too large a state debt.

> These constitutions include those of Germany, Switzerland, Poland and Spain. In Italy and Austria proposals have been launched to this effect, and under the new 2012 fiscal compact between most EU Member States, they have all agreed to introduce a (constitutional) provision to that effect.
> Other examples are that:
> – the European Convention of Human Rights, Protocol 1, Article 1, in protecting the right of free enjoyment of property limits the conditions under which states can nationalize properties;
> – EU law imposes economic choices such as free competition, upon the Member States; and
> – the rules of the World Trade Organization do not permit the inhibition of trade or the financial support of exporting industries.

Limitations on State Power Constitutional law subjects the state itself to constraints. Its power may be distributed between different territorial subunits, such as regions, so that the central authority does not have an exclusive grip on all state power. Its power may be distributed among various organs, so that it does not wholly rest in any one organ. It is even possible that an organ does possess power to make choices; some choices may simply be prohibited by constitutional law.

8.2.1 Territorial Division of State Power

One way for constitutional law to curb state power and to prevent its concentration is to spread it over smaller territorial units and to create regional and local governments that exercise state power for their respective units. At the local level, the typical territorial subunit would be the municipalities: towns and cities. The more prominent entities are found at regional level: districts, provinces, or—somewhat confusingly—individual states within a larger federal state.

> The Unites States comprises, as the name suggests, "states"; Mexico and Brazil also comprise states as regional entities. Germany is made up of *Länder*, a term which is also translated as "states". Yet, federal systems may also use other names for their sub-units: *Cantons* in Switzerland, Provinces in Canada, Regions in Belgium; Australia comprises both states and somewhat less powerful territories.

The major distinction between states in terms of their internal territorial distribution of power revolves around the question whether they are unitary states or federations.

8.2.1.1 Unitary States

In a unitary state, all state powers ultimately reside in one central government authority. There may be local or regional authorities, but in a unitary state any such local and regional decision-making powers are granted by central laws. This means that the central government authority may again retract these powers without institutionalized involvement, let alone consent, of the local or regional governments themselves.

> In the Netherlands, which is a decentralized but unitary state, provinces and municipalities have their own local regulatory and executive powers. Their autonomy in local affairs is protected by the constitution, but the exact extent of any further provincial and local powers is laid down in national laws. If the state wants to retract these powers, and give them to its central organs instead, it can do so by changing the relevant laws or by deleting local autonomy from the constitution. The provinces and municipalities themselves will have no formal say in either of these changes.

8.2.1.2 Federations

In a federation, state powers are divided between the organs of the central state (the federal level) and the organs of the subunits (the regional level), and this division is enshrined in the constitution itself, not in ordinary central laws. The involvement of the regions in any changes of this division of powers, if at all allowed under the constitution, is highly relevant because this protects the regions against possible restrictions of their powers.

The regions in a federation can exercise the powers that they have in their own right. Even where the federal level is competent to make laws that cover the entire national territory, in many federal states the regions are involved in the federal lawmaking process.

> The most common way for regions to be involved in federal law-making is through an upper chamber in a two-chamber federal parliament. Such a senate would represent the regions as such, as fully or largely equal parts of the federation. The Senate of Czechoslovakia, a historical federation between the Czech and the Slovak part of the country, for example, included as many Czechs as Slovaks; the lower chamber of Parliament, representing the population as a whole, contained more Czechs, since the Czech population was actually larger in size. In the US Senate, too, each state has the same number of members, namely two, whereas the states' representation in the House of Representatives depends on their population size.

Regional participation in federal lawmaking would also be guaranteed in the constitution, as would be the region's involvement in any change to that constitution.

> The US and Germany are federal states, and in both cases the federal constitution can only be changed with the involvement of the regions. In Germany the states are involved through an upper chamber which must act by a super-majority of two-thirds; and some amendments of the constitution (e.g. the abolishment of the federal character of the state, is expressly forbidden). In the US, constitutional amendments must in addition be approved by a super-majority of the states themselves. This makes it difficult to redistribute regional and federal powers, especially to centralize powers, and it makes it impossible to side-line the regions in such an endeavor.

8.2.1.3 Confederations

In a confederal structure, the participating entities effectively remain sovereign states in their own right. The decision-making process in a confederation typically requires unanimity and is restricted to limited issues. A confederation may in fact be so loose that it would not actually be called a state.

> The Confederation of 1781, the construction that preceded the modern Union of the United States, was based on a looser association of the individual states, and on a greater preservation of the states' sovereign rights.

While the juxtaposition between the unitary state and the federation is convenient, it should be noted that unitary states can feature different degrees of centralization of power. Federations can preserve the prerogatives of their regions to a larger entity (United States) or to a lesser extent (Austria). Unitary states can become federations (Belgium), as well as joint federations, and cease to be sovereign states (like the German principalities did in 1871). Federations can also centralize and become less federal and more unitary (Russia, when regional governors were centrally appointed rather than locally elected). The result is a sliding scale, as depicted in Fig. 8.1.

8.2.2 Functional Division of State Power

The same state power that may be beneficial if used in a proper way can also be threatening for the people who are the state's subjects. As famously stated by the English politician Lord Acton, in 1887:

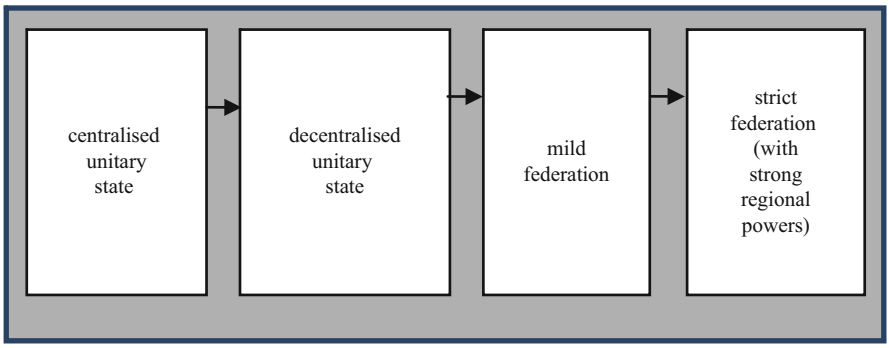

Fig. 8.1 From centralised state to strict federation

> "Power tends to corrupt, and absolute power corrupts absolutely."

As noted above, Thomas Hobbes advocated a strong central government with unified powers in order to effectively pacify the population. However, several theorists, including John Locke (1632–1704) and Montesquieu (1689–1755), have proposed functional divisions of state power.

State Functions Here we will focus on the idea put forward by Montesquieu, who distinguished three functions of the state, namely:

1. the creation of general legal rules by means of legislation,
2. the practical implementation and execution of these rules: administration, and
3. the application of rules to decide disputes in individual cases: adjudication.

Montesquieu argued that these three functions ought to be kept apart and should be assigned to three separate branches of the state: the legislature, the executive, and the judiciary. Moreover, each branch would have to stay within its domain. Thus, the courts must only decide in actual cases and should not make general rules; the legislature must not execute the law or rule in individual cases; and the executive has to execute the laws made by the legislature and must abide by decisions made by the courts.

> A law passed by parliament, acting as the legislature, may for example provide that heirs can inherit the property of a deceased person and be issued an inheritance certificate (a provision in the civil code), but that they must pay an inheritance tax (a provision in the tax code). The government, acting as the executive, then goes on to actually issue the certificates (through the civil registrar) and to collect the tax (through the tax inspector). If several heirs argue over their entitlement to the inheritance, the issue may be resolved by a civil court; if an heir argues that he or she should be exempt from the inheritance tax, the issue may be resolved by an administrative court.

Trias Politica This view of Montesquieu has become known as the Trias Politica, after the three bodies that fulfill the three separate state functions. In many states,

we find these three branches of government, albeit in different shapes and forms and with slightly different definitions of their respective powers.

The US Constitution provides a clear example of a Montesquieuvian separation of powers model:
– Article I stipulates that Congress is the legislature;
– Article II defines the President as the head of the executive power; and
– Article III establishes the Supreme Court and regulates the subordinate federal courts.
Many other constitutions, such as the one of Iceland, are less doctrinal in their numbering but still refer explicitly to legislative, executive and judicial tasks as distinct functions. Even the constitution of the Vatican acknowledges that these three functions can be distinguished, even though all three of them are in fact exercised by the Pope.

In Western democracies, the legislative function is typically assigned to the directly elected parliament, although not necessarily on an exclusive basis.

Sometimes the legislature is defined as Parliament and the Head of State acting together, such as in Iceland or the United Kingdom. Legislative powers may be exercised by regional authorities in federal systems, or international organizations of which a state is member, or by the people themselves in a referendum. Even where legislative power lies with parliament proper, the executive typically takes the initiative to introduce new laws and secure their adoption. Sometimes even the institutional separation between the parliament and the government is blurred: in France, government members cannot be parliament members at the same time, whereas in the United Kingdom government members actually *have to be* members of parliament, and they sit on benches in the parliamentary plenary hall among the other members.

8.2.3 Independent Courts

The aspect of the separation of powers that is probably easiest to imagine, much more so than the separation between parliament and government, is the independence of the courts and of the judges sitting in the courts. The guiding principle, which is also enshrined in Article 6 of the European Convention on Human Rights, is in particular to ensure that neither a court nor its judges can be abolished at whim or be dismissed. Appointment for life may be one of such mechanisms to ensure that the government cannot put pressure on judges to decide one way or another or otherwise interfere with the administration of justice.

Elected Judges Another way of trying to secure this principle is the election of judges by popular vote so that they are answerable to the community and do not depend on the government for appointment or reappointment.

The majority of US states feature elected judges, even though US federal judges are appointed rather than elected.

In Europe, the notion of elected judges is usually met with distrust since the emphasis is put on the judiciary's professionalism rather than on popularity. As a matter of fact, election campaigns for judgeships tend to stress the candidates' strict stance on crime, which in the long run can drive up incarceration rates (the number

of prisoners per 100,000 inhabitants) to excessive levels. However, there is no fundamental reason to object to the election of judges, and it may well be seen as a strong democratic and antipaternalistic safeguard.

Appointed Judges Where judges are appointed, independence can be ensured in a number of ways: judges may be appointed for life, which means that they cannot be removed very easily and will not need to cater to the interests of the incumbent government, or they may be appointed for a limited but long period of time and without the possibility of a second term, which is again designed to remove incentives to please those who may reappoint the judges.

> The judges at the European Court of Human Rights used to serve renewable six-year terms; since 2010 they have been serving non-renewable nine-year terms.

Impartiality Apart from being independent, courts and judges must also be impartial in two senses. First, they should not have any interests in the outcome of a case, be related to a party to a case, or have had an earlier involvement in the issue at hand (objective impartiality). Second, they must have an open mind and not be (or be seen as) more favorable to one party than to the other (subjective impartiality).

8.2.4 Parliaments and Governments

Compared with the independence of the judiciary, the separation of the legislature and the executive, i.e. typically parliament and government, is less straightforward. According to the doctrine formulated by Montesquieu, the legislature creates laws, while the administration executes them. In this view, the executive would be the servant, or agent, of the legislature. In reality, the issue is more complicated. In lawmaking in parliamentary systems (see Sect. 8.2.4.1), parliament generally follows the agenda of the government where its policy agenda and proposals for laws are concerned.

The actual tasks of the administration go beyond mere execution of the laws created by the legislature. Administrations are also prominent in formulating and drafting legislative proposals. In Western democracies, most (if not all) policy making is carried out by the government. In doing so, the government relies on the expertise of its civil service. For the realization of its policies, the government actively seeks the approval of desired legislation in parliament. Policies are implemented and executed not only by means of legislation but also in many other ways: by taxation, by subventions and subsidies, by market supervision, by building of roads, harbors, and schools.

> Doctrinally it may be true that the legislature creates a tax law and the government goes on to collect the tax. In fact the usual scenario would be that the government calculates how much revenue is needed to finance desired spending, and may decide that rather than cutting spending or incurring debt it is necessary to raise taxes. Depending on the national system, it then requests the adoption of a new tax by parliament or directly submits a new draft tax law to parliament.

8.2.4.1 Parliamentary Systems

A crucial factor affecting the shape of government–parliament relations is whether the system is parliamentary or presidential in nature. In a parliamentary system, the head of the executive (administration)—usually a prime minister—comes to office (or at least stays in office) as long as he is supported (or at least tolerated and not voted out of office) by parliament (or at least the lower chamber of parliament).

Historically, this is the older form of divided government, as seventeenth century English parliaments, eighteenth century Swedish parliaments, and parliaments in many other European monarchies in the nineteenth century made sure that the respective monarch would not appoint a government against parliament's will. The effect is that the *government is accountable to parliament* rather than to the monarch. In a republic, the Head of State may still appoint a prime minister but then would do so either after the prime minister has been elected by parliament or, again, with a view to the creation of a stable government that has enough support in parliament.

However, while the government depends on the parliament to stay in office, the modern reality in parliamentary systems is that a prime minister who enjoys majority support in parliament is able to not only guide the executive but also demand loyalty from the majority that keeps him in office when he puts forward a legislative proposal.

> Indeed, in Western parliamentary democracies almost all bills, i.e. proposals for laws, originate in the government. Still, parliamentary consideration serves an important societal function in that the opposition can make its voice heard by asking sharp questions or by criticizing the government's projects with a view to winning future elections and forming a government itself.

8.2.4.2 Presidential Systems

In contrast, in a presidential system, the head of the executive (whether he is called President or something else, such as Governor) has his or her own mandate, which is independent from parliament.

> For example, US governors, the government leaders in the US states, are directly elected. The US President is elected formally by indirect popular vote via an electoral college, but this has *de facto* all the features of a direct election and ensuing mandate.

In such a case, the head of the executive does not rely on parliamentary confidence to stay in office, and members of parliament—who are directly elected as well—are not compelled to support the head of the executive either. Their fates are entwined to a much lesser extent.

> The contentious introduction of healthcare reform by US President Obama in 2009/2010 serves as an example of the constitutional constraints that a government in a presidential system faces when seeking the adoption of legislation. This was still a time when the President's party controlled both chambers of parliament. After the loss of the majority in the House of Representatives in late 2010, governing became even harder for the President.

8.2.4.3 Semipresidential Systems

France and also other states such as Romania or Russia feature a semipresidential system. They have a directly elected Head of State who has executive powers (the presidential aspect), as well as a Prime Minister who is accountable to parliament and can only remain in office with parliamentary support (the parliamentary aspect).

Other republics may have presidents and prime ministers too; if these presidents have only ceremonial roles and no executive powers, the system is still considered parliamentary. Examples of such systems are Germany, Italy, or Israel, where executive power is held by the respective Chancellor or Prime Minister.

Main Forms of Government

Parliamentary systems

- The head of the executive relies on the confidence or tolerance of Parliament to enter, or stay in, office.

Presidential systems

- The head of the executive is elected independently from Parliament.

Semipresidential systems

- A directly elected Head of State and a Prime Minister who is accountable to Parliament share executive power.

8.2.5 Checks and Balances

Forced Cooperation In its pure form, the Trias Politica doctrine envisages separation of powers. An effective way to perpetuate this separation, and to prevent a concentration and subsequent abuse of state powers, is to partly assign functions to various institutions jointly. This deliberately allows the powers to interfere in each other's domain to a certain extent, keeping each other in check, and it forces them to collaborate to achieve common goals. The idea is called *checks and balances*.

One example of checks and balances is the ordinary legislative procedure of the European Union. If European laws are to be made, a proposal must be submitted by the Commission which has the sole right of initiative. This proposal must then be voted upon by both the Council of Ministers and the European Parliament (see also Sect. 10.3.2).

Under the US Constitution, federal judges are appointed by the President, but this appointment is subject to the approval of the Senate. In the law-making process, the Senate and the House of Representatives jointly adopt legislation but the President may veto it, which may in turn be overruled by super-majorities in the House and the Senate.

Judicial Review A very important check on the political institutions of parliament and government is judicial review, whereby courts would check the legality of acts of these institutions.

A court exercising judicial review might rule that the collection of a tax by the government was not covered by the tax code, for example because the tax code provided for a tax

exemption in a particular case under which the applicant falls, and that the tax has therefore been collected unlawfully.

Arguably, the ultimate power of judicial review is constitutional review, whereby a court checks whether legislation adopted by parliament itself is lawful in the light of what the constitution provides.

A court carrying out constitutional review, if it is competent to do so, might rule that the tax code itself is unconstitutional, for example because it imposes a higher tax on women than on men whereas the constitution prohibits discrimination based on sex. Thus, even if the collection of the tax took place in accordance with the law, it would still be unlawful because its legal basis was unlawful, and in this case unconstitutional.

More on this constitutional review will be discussed in Sect. 8.2.8.

8.2.6 The Rule of Law

The overarching constraint from constitutional law on the state is the rule of law itself. It is hard to define what exactly the rule of law means because interpretations differ. In a broad sense, the rule of law may include such sweeping notions as fairness, inclusiveness, independent adjudication, accountability, or transparency. It also has the qualitative meaning that the law must not only be legal but also reasonable, compatible with human rights, and fair. In its narrow essence, though, it means that

- the state rules through law, and
- the state itself is ruled by law.

The first aspect means that the exercise of power must be performed by methods that comply with minimum standards to prevent arbitrariness. For example, laws that are enforced against citizens should at the very least be published before they are enforced. It also means that the proper procedures have been followed in making the law and that the law was made or executed by the competent authorities.

Legality The second aspect means that the state and its organs are only allowed to perform particular tasks if it has been given the power to do so by law and to the extent that such performance is allowed by law. Thus, state action requires a legal basis: the state may do nothing unless it is authorized by law, a concept known as the principle of legality.

This principle plays an important role in both criminal law and administrative law. As the requirement of a legal basis, it also functions in European Union law. See Sect. 10.6.5.

The opposite is true for private citizens: they may do everything unless it is prohibited by law. Even where the state is authorized to act, it remains bound by the law in the performance of the action itself.

A policeman cannot stop vehicles on the road unless he is authorized to do so by law. The policeman cannot open citizens' private letters if this would violate the fundamental right to freedom of correspondence.

And even where powers actually have been given, they can only be exercised in accordance with the purpose for which they have been given.

This is called the prohibition of abuse (or misuse) of power, or of *détournement de pouvoir*.

The mayor of a town may decide on the granting of building permits, but he may not refuse a permit just because the applicant belongs to a political party which opposes the mayor. See also Sect. 8.3.2.2.

The notion of the rule of law is largely a common law notion. In civil law systems, reference is often made to the *Rechtsstaat* or *État de Droit*. This is a state "under the law," which generally means that the state is bound by legal norms, respects the separation of powers, and abides by human rights.

8.2.7 Fundamental Rights

A very important way to curb the state's power, and to protect the individual against it, is to commit the state to respect fundamental human rights.

Classical human rights are referred to as civil and political rights, for example the freedom of speech or freedom of expression. This prevents the state, in principle, from censoring newspapers or from prosecuting individuals for what they have said or written.

8.2.7.1 Codification of Fundamental Rights

Magna Carta The codification of fundamental rights goes back many centuries. An important historic example (even though we have to acknowledge that this document did not cover all human beings) was the *Magna Carta* (1215), a document in which King John of England accepted limitations to his arbitrary power.

It contained, for instance, the rule that no "freeman" could be punished except through the law of the land.

The English Parliament again insisted on the codification of individual rights in the Bill of Rights 1689.

Declaration of the Rights of Man and the Citizen Two other more recent historical documents are of particular importance. One is the Revolutionary 1789 French Declaration of the rights of man and the citizen, which heralded the overthrow of the absolute power of monarchs on the European continent.

Bill of Rights The other is the Bill of Rights, which was added in 1791 to the US Constitution.

Subsequent modern constitutions, particularly in the twentieth century, also reserved prominent chapters for human rights catalogues. Combined with the power of courts to strike down laws that conflict with the constitution and its human rights catalogue, where such power exists, these bills of rights proved to have a great political and legal significance.

International Instruments In addition to national codifications of fundamental rights, international instruments protecting human rights have been adopted as well, including the Universal Declaration of Human Rights of 1948, and regional instruments such as the European Convention on Human Rights of 1950, or the European Union's very own bill of rights, the Charter of Fundamental Rights of 2000, which became legally binding in 2009. These and many other international human rights instruments underline the importance attached by the international community to build mechanisms through which states may be held accountable for human rights violations.

8.2.7.2 Interpretation of Fundamental Rights

The actual interpretation of fundamental rights is not always easy. The rights are formulated in a necessarily broad manner so that it is up to the authorities, and often in the final instance to the judge, to determine what is allowed and what is not in real-life circumstances.

Scope of Rights Consider in this respect the principle of equality or nondiscrimination, which prescribes the equal treatment of people in equal circumstances, and the difficult questions that can arise from its application:

- Is the wearing of head scarves an infringement of the equality principle (where it is imposed on women only), or does banning head scarves from public life constitute an infringement of the equality principle (where other types of headgear are not banned)?
- Is it a violation of the principle of equality to further the societal equality of minority groups by according them preferential treatment over majority groups via so-called affirmative action?

Reversal of Rights Or consider the possible reversals of recognized fundamental rights:

- Does the freedom of religion only entail the right to freely practice one's religion, or does it also include the right not to be bothered by other people's religion, in cases where crucifixes are displayed in schools?
- Does the right to life only entail protection from unlawful killing by the state, or does it also include the right to end one's own life and to seek the assistance of a

physician for that purpose (euthanasia), in cases where the law prohibits assistance to suicide?

Balancing Even where the scope of a fundamental right as such is relatively clear, it may still be that the right has to be balanced against a public interest:

- how to balance the right to privacy (which may include the right to have private conversations on the phone and to keep personal genetic information out of the state's hands) against the public interest of fighting crime, including terrorism (which may require phone tapping and the keeping of DNA databases);
- how to balance the right to family life (which may include the right to not be forcibly separated from family members) and the public interest to implement immigration policies, in case one family member is to be expelled from the country for being an illegal immigrant.

Some fundamental rights are found in many legal systems, but the interpretation and application of the rights often differ between the systems.

> For example, in some systems free speech is upheld even in cases where the speech is intemperate, because the right as such is linked to the open and unimpeded political process and is perceived to require the most far-reaching protection in a democracy. In other systems, certain expressions such as hateful propaganda are deemed to be a threat to the functioning of the democratic system itself, including its human rights values, and are excluded from the protection that freedom of speech otherwise accords.

The successful invocation of fundamental rights in court may trump democratically legitimized public choices, which makes the area relatively sensitive. Still, a tendency can be observed, where more and more claims are phrased as human rights arguments. Where classical civil and political rights focused on preventing the state from interfering with individual liberties, for example by not torturing people and by not exercising censorship, more recent social and economic rights are phrased in a way that calls for state action to pursue certain goals. Thus, the right to education or health care would require the state to provide for schools and hospitals. Even more recent third-generation rights include legal claims to things like a clean environment. This certainly does not make the task of public authorities, especially judges, any easier.

8.2.8 Judicial Review

Problematic Nature Constitutional review of legislation by courts, where it exists, means that judges have the power to check whether a law is in compliance with the constitution. The exercise, which is for reasons of brevity usually referred to simply as judicial review, is not entirely unproblematic. After all, it means that judges overrule the will of the lawmaker and impose policy choices on society through their own interpretation of what the constitution supposedly means. Judges

enjoy neither the proper legislative power nor the democratic legitimacy of an elected parliament. And yet, a case can be made that judicial review is a necessary or at least a useful institution to have.

8.2.8.1 Reasons for Judicial Review of Legislation

Checks and Balances First, judicial review of legislation can be an element in the checks and balances between state organs. The judiciary then acts as a check upon the legislature. The idea that courts must check upon the legislature has not remained undisputed, however.

> In the United Kingdom, the notion of the supremacy of Parliament implies that the will of the legislature cannot be questioned by the courts.
> In the Netherlands, it is the lawmaker who is entrusted with respecting the Constitution when making laws, not the judge.
> In France, judicial review was not possible until 2008, when the Constitution was changed to allow judges to refer questions of constitutionality to a special organ, the Constitutional Council. Before that, the separation of powers was taken to imply that judges should be separated from law-making and therefore should not question the validity of laws.

Will of the People A second rationale for judicial review is that it upholds the supremacy of the constitution and thereby, in systems based on popular sovereignty, protects the will of the people itself, as is expressed in that constitution.

> This was the reasoning in the 1803 US Supreme Court decision in the famous case *Marbury v. Madison*: it is clear that the Constitution is higher in rank with respect to ordinary laws, and that judges are obliged to let the Constitution prevail over such ordinary laws if the two are in conflict, due to the fact that Congress had passed a law that violates the Constitution.

Protection of Minorities A third argument is based on the assumption that courts, situated at a certain distance from politics, are more inclined to protect individuals and minorities against majorities that control lawmaking institutions and that a democracy must also protect such minorities.

8.2.8.2 Decentralized Systems

A very fundamental organizational distinction regarding judicial review is whether the review is carried out by all courts in a system or by one special constitutional court. In a decentralized system, the constitution is a norm that all judges must uphold whenever they are asked to apply a law whose validity they doubt. The power of judicial review is in that case linked to the regular jurisdiction of all courts to resolve conflicts of norms before resolving disputes between parties.

> The judicial review system in the US is strictly decentralized: there is nothing special about the Supreme Court, other than the fact that it is the highest in the federal judicial hierarchy.

The Nordic countries in Europe also have a decentralized system of judicial review, although courts there tend to be more restrained and to yield to the preferences of parliament.

In a decentralized system, assessing the validity of a law vis-à-vis the constitution is not perceived as fundamentally different from deciding on a conflict between a law and lower regulation or between two laws.

8.2.8.3 Centralized Systems

In centralized systems, as they apply in most of Southern, Central, and Eastern Europe and beyond, ordinary judges must refer questions regarding the constitutionality of laws to a constitutional court, which then has the sole power to quash them. This model allows for a concentration of constitutional expertise and for the imposition of specific requirements and procedures for the appointment of constitutional judges who are, after all, entrusted with a delicate task.

In Germany, each of the two legislative chambers – the *Bundestag* and the *Bundesrat* – elects half the judges at the Federal Constitutional Court. That is different from the appointment procedure for judges at all other federal courts. In Belgium, a fixed number of judges at the Constitutional Court must be former members of parliament.

8.2.8.4 Types of Review

The power of constitutional courts can go far beyond judicial review in cases referred to them by ordinary courts. For next to this *concrete* review, which arises from actual adversarial court proceedings between parties, some constitutional courts may also engage in *abstract* review. In that case, officeholders such as the government or members of parliament may claim that a law is unconstitutional even though it is not being applied in a concrete case. If judicial review is considered sensitive or controversial, it is surely abstract review that will attract most controversy. After all, here it cannot be said that judicial review is an inherently judicial task like the resolution of any other conflict of norms: here a court is expected to pronounce itself in a context that normal judges are not confronted with and to rule in the abstract. Nevertheless, where judicial review is cherished as a powerful countermajoritarian instrument for checking on the lawmaker and for upholding the constitution, abstract review is certainly not misplaced.

8.2.8.5 European Union

Judicial review also exists in the European Union. It is exercised by the Court of Justice of the European Union (CJEU): a centralized system. The domestic courts must refer legal disputes that raise the question about the interpretation and validity of EU rules to the CJEU for a binding ruling (see Sect. 10.4.5).

For EU Member States, EU law is supranational law, which must be applied by the domestic courts even when this implies the setting aside of domestic law. This has certainly had a large impact on domestic perspectives on the inviolability of domestic law.

8.2.8.6 Judicial Review by Specialized Courts

Constitutional judicial review can have many features when put in the hands of special courts: we draw attention to four of them:

1. When a question arises about the unconstitutionality of a statute in a case pending before a court, the court may/must refer the case to the constitutional court and await its ruling on constitutionality [France (since 2008) and Germany].
2. Members of parliament may refer a statute to the constitutional court to check for its constitutional validity even after it has been adopted. The court has to rule on the constitutionality of a statute in the abstract without the statute having been applied (France—this review only took place before a law adopted by Parliament entered into force—and Germany).
3. Individual citizens may file a complaint with the constitutional court, arguing that their individual rights have been violated by state organs (Germany).
4. Constitutions or statutes may empower a constitutional court to rule on "other" constitutionally important issues such as election disputes (France, Germany), prohibition of political parties (Germany), or conflicts between political agents, such as between chambers of parliament or a minority in parliament and the majority/government (Germany).

Judicial review is a potentially powerful instrument. In many states, it has led constitutional courts to deal with far-reaching issues, such as whether social security or tax laws should be set aside because of discriminatory aspects. Judicial review has also tackled several moral issues in relation to constitutions, such as the right to an abortion, the possibility for homosexuals to get married, and the protection of the rights of citizens to peacefully demonstrate and associate. As a result, there is an ongoing debate about the scope of the powers of constitutional courts, which addresses issues such as

– How does a constitutional court interpret the constitution?
– To what extent should the constitutional court accept the judgment of Parliament?
– How does a constitutional court cope with judgments that might have huge financial impacts (as might be the case in the domain of taxation)?
– How does the court deal with politically sensitive issues, such as the constitutionality of the health care system (decided in 2012 in the US) or the constitutionality of the European rescue fund for the euro (Germany)?

8.3 State Power Democratized

"Democracy" means "rule by the people." Historically, the term had some negative connotations, as it sometimes implied anarchy or mob rule. Today, however, the term "democracy" has a universally positive connotation. Democracy implies that

– the government is installed to rule the people because it is in the interest of the people to have a government in the first place, and
– this government pursues the interests of the people rather than its own.

Under a democracy, the idea is that the government rules with the consent of the governed, or at least that the government is established with the support of the people and has regular confirmation of that support, or else should not be in power. As a form of government, democracy is endorsed around the world. States are either democratic, or if they are not, they usually claim to be democratic. In the latter case, they may argue that the regime actually represents the interests of the people even if it did not get elected or if elections were not free and fair.

> One should always be suspicious if a republic advertises its democratic character by calling itself "Democratic Republic" or "People's Republic."

Effects of Democracy The case for democracy is indeed compelling because one might think that it helps in aligning government choices with the citizens' preferences, which then maximizes the well-being of the greatest number of people. Or at least it helps in conveying the message that the government is based on collective choice and promotes policies that serve the general interest. Also, regular elections ensure that the government remains accountable to the people and the risk of abuse of power is minimized because rascals can be voted out of office; transition of power is bloodless because it is regulated in a universally accepted peaceful procedure.

Less Wars? It would also be an interesting hypothesis to argue that even the likelihood of war, at least between democracies, is minimized: democratic governments should be as war-averse as their people are (after all, the people pay the price of war), and they can rely on the knowledge that the same will hold true for other democratic governments. This does not evidently prevent a democracy from engaging in a military conflict or an overall war.

The invasion by the US of Iraq and its involvement in Afghanistan are examples here, and they show that when the interests of democracies are sufficiently threatened, they are willing to pay a price. If however a government's preferences are not, not necessarily, or not reliably aligned with the people's, as is the case in dictatorships, one can never be too sure about this government's intentions.

8.3.1 Direct and Indirect Democracies

Democracy is a system of government where public power lies with, or emanates from, the people. If the democracy is direct (lies with the people), the state power is actually exercised by the people themselves; if the democracy is indirect (emanates from the people), the power is exercised by the people's representatives.

8.3.1.1 Direct Democracy

In hunter-gatherer societies, the members of a band could easily assemble around a campfire to discuss public affairs, such as where to move next or how to deal with individual misbehavior. This does not mean that such prestate forms of society are superior to societies in large modern states—by practically every measure, they are not. The only point made here is that communal decision making is very immediate. In constitutional terms, it is a form of direct democracy as the constituents who make up a society decide by themselves and for themselves. Later, urban societies, notably the Athenian democracy, also reserved crucial decision-making powers to the general assembly of citizens.

Complex Decisions There are two major problems with the practicality of direct democracy. One has to do with the complexity of the decisions that need to be taken. In organized societies, gains in productivity are achieved by division of labor, which in turn compartmentalizes society. Meanwhile, the reduced rates of violence between people, and the rising living standards resulting from productivity gain, facilitate population growth. In turn, this growth increases the complexity of society. In increasingly large and increasingly complex societies, assuming they are still to be organized according to democratic principles, decisions also become complex. This may extend to the point where ordinary citizens cannot grasp the full extent of the implications any particular decision could have.

Logistics This leads to the other problem: the logistical organization of democratic decision making in societies made up of millions of people is complicated. This is especially the case if such decision making is not supposed to be limited to casting a vote but should also include collective consultation and an exchange of opinions.

Furthermore, one would need rules to prevent the abuse of powers by direct democratic majorities and human rights violations, as well as definitions of who participates, in what procedures, and under what criteria, as well as about the execution of policies and possibilities of redress, judicial review, etc. These issues would also apply to representative democracy.

8.3.1.2 Representative Democracy

To deal with the increasing size and complexity of decision making, representative or indirect democracy becomes a viable alternative to direct democracy. In a *pure* representative democracy, public power is exercised by a ruler, or group of rulers, who have been elected or appointed by the ruled. For the duration of their term of office, the rulers are not subject to dismissal by the ruled and their decisions may not be overturned by the ruled themselves. As the French scholar Montesquieu wrote in 1748:

> As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the legislative power should reside in the whole body of the people. But since this is impossible in large states, and in small ones is subject to inconvenience, it is fitting that the people should transact through their representatives what they cannot themselves.

Challenges The implementation of a representative democracy creates a number of challenges that are addressed by means of constitutional law:

- It should be decided how the rulers are elected or appointed.
- A system needs to be devised to regulate how powers are distributed among various rulers and how the offices relate to one another.
- Fundamental considerations should be devoted to the question how to prevent abuses of power by the rulers. After all, there is no guarantee that those in power will not seek to perpetuate their power, at which point the system becomes neither representative nor democratic.

Controls against abuse of power are indeed vital. As the American revolutionary and drafter of the US Constitution James Madison observed in 1788:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Recall A powerful check on the government in a representative democracy is the introduction of elements that are taken from direct democracy. In an otherwise representative democracy, direct democratic elements can take two main forms: the recall election and the referendum. A recall is a popular vote to dismiss an already elected officeholder before the term of office has expired.

In Western systems, recalls are typically found at regional and local levels rather than at national level.

> Famously, Arnold Schwarzenegger became governor of the US state of California in a recall election to oust the incumbent governor Gray Davis in 2003.

Referendum A recall is a deviation from the principle of representative democracy that powers are delegated for a fixed term and that the electoral sanction is the refusal to reelect an officeholder. A referendum, meanwhile, deviates from the principle that decisions are taken by the rulers on behalf of the governed. Instead, the approval or continued effect of a certain decision is left to a popular vote.

> Sometimes a referendum vote is used not only to correct decisions as taken by the legislature (asking for a yes or no of a legislative decision – corrective referendum), but also to enable the people to adopt a new and original proposal which becomes law after adoption, bypassing the legislature. States may opt for both possibilities or pick one of them.

Evidently, referenda need to be subject to procedural checks, such as the circumstances in which a proposal is considered to be adopted or rejected (e.g., whether it is because a majority of the votes have been cast or there is a majority of the people in favor, defining the threshold needed to table a referendum, what subjects may be excluded from a referendum, etc.).

The modern use of "referendum" derives from a Swiss practice to adopt agreements between the *cantons*, or constituent regions, whereby the agreements would be subject to a referral ("ad referendum") to the people of the *cantons* themselves before they could enter into force. To this day Switzerland is the most famous Western system for its frequent reliance on referendums.

To some, referendums constitute the purest form of the democratic legitimation of a decision, guaranteeing the explicit consent of the governed and forcing rulers to align their own preferences with the preferences of the population they represent. Others might point out that most decisions are too complex to be determined in a simple "yes or no" fashion and that populations tend to be generally change-averse so that the necessary reforms are made more difficult.

Main Forms of Referendum

Mandatory referendum

- For certain types of decisions, a referendum is required. Examples include constitutional amendments, which in some states must be approved by referendum.

Optional referendum

- For certain types of decisions, a referendum can be but does not have to be called. Examples may include a popular vote on whether or not to join an international organization.

Binding referendum

- The outcome is binding: a rejected proposal cannot enter into force; it has to be approved.

Consultative referendum

- The outcome indicates the preferences of the voting population, but the government may deviate from it nonetheless.

8.3.2 Authoritarian Government

The observation by Madison (see above) about the difficulties connected with a government of humans over other humans should serve as a reminder that modern societies can also function very well in the absence or only partial presence of democracy. Authoritarian governments originated with the emergence of sedentary societies and the rise of agrarian culture. This rise of the agricultural industry allowed land to be owned, for the production of food and for the storage of excess food in large quantities. This boosted the size of the human population while doing away with the need for collective food acquisition and sharing of food for subsistence. Rulers or ruling classes achieved a position to impose their will on the rest of the population.

The most extreme forms of undemocratic government, historically and in modern times, are absolute monarchies, where the monarch is not constrained by law, and republican dictatorships, where legal constraints on power are purely theoretical and therefore absent.

An example of a contemporary absolute monarchy is Saudi Arabia, while the most repressive republic is arguably North Korea. However, dictatorship does not mean that the regime is not responsive to the needs and wishes of the population. It simply means that the population has no reliable institutionalized method to align the regime's priorities with its own preferences, for example by voting the proponents of one policy out of office.

8.3.2.1 Drawbacks

Transition of Power There are several drawbacks of monarchical or republican dictatorship. One concerns the transition of power from one ruler to the next, which in a stable democracy is competitive but regulated and bloodless, whereas power struggles may arise over the succession in monarchical autocracies (e.g., between competing family branches) or in republican dictatorships (e.g., between competing factions of the regime).

Suppression of Dissent However, there are some rather more compelling arguments against dictatorship. Firstly, rulers will tend to suppress dissent by violent means, chiefly because once ousted they may be banned from power forever, whereas in a democracy a government that has been voted out of office can try to win elections in the future.

Heteronomy Secondly, rule by one or a few results in almost all people living in heteronomy, with the will of others imposed on them, rather than in autonomy. Rule by majority ensures that the smallest number of people lives in heteronomy and the greatest number lives in autonomy, that is, under decisions they support.

Even undemocratic regimes seek to legitimize their rule through popular consent, such as by claiming that they exercise the will of the people or of the working class. However, the claim is hard to verify because of human rights abuses, the absence of free speech, and the absence of free, fair and competitive elections. Monarchical one-person rule often cannot claim popular consent but instead has to rely on a religious claim, such as kingship through the grace of God.

8.3.2.2 Advantages

Clearly, there are also advantages to dictatorship, though, notably in times of emergency or possible conflicts or turmoil and great challenges. In present times, attention is sometimes asked for the ineffectiveness of democratic systems to cope with growth, economic and financial crisis, and globalization. Recently, it has been argued that for that reason the spread of democracy has come to a standstill and that systems such as Russia and specifically China may be more capable to cope with the challenges that lie before them and to ensure economic growth.

The French Constitution, in Article 16, provides for far-reaching emergency powers for the President, but even they are constrained in that parliament is in session automatically. The National Assembly cannot be dissolved in such situations, and a review of the necessity of continued emergency powers takes place after certain periods of time. During such an emergency, the constitution may not be amended either.

8.3.3 Election Systems

While dictatorship clearly has disadvantages, a representative democracy is still not the only alternative form of democracy, and in fact it may not even be the fairest one. Montesquieu himself saw the merit of the Athenian way of appointing certain (though not all) magistrates by lot from among those who would volunteer to put their names in a lottery drum. Election-based systems were seen as having an aristocratic tendency in that rich and influential elites would monopolize power, whereas lots would ensure a healthy rotation in office. Nevertheless, in the Enlightenment-inspired eighteenth century revolutions in America and France, the lot was discarded, both because it was impracticable and because a higher value was accorded to the consent of the governed, which cannot truly be expressed via lot but which can be expressed very well through elections.

8.3.3.1 Franchise

Who is allowed to vote? Throughout history, several restrictions were applied on the franchise, that is, the right to vote. In Western democracies, the franchise is in principle universal, as the most important limitations of the franchise have been overcome, namely:

- the exclusion of women's right to vote,
- the exclusion of the right to vote for slaves or serfs, and
- the exclusion of the right to vote for persons not fulfilling certain property or taxation requirements.

However, in the contemporary world, certain limitations do exist or persist, notably the exclusion of minors through a minimum age limit, the exclusion of soldiers, the exclusion of convicted prisoners or persons with a prior conviction, the exclusion of foreigners, and the exclusion of nationals living abroad.

> At times, the expansion of the franchise to all residents including foreign nationals has been demanded. After all, foreigners do pay taxes and take part in public life similarly to nationals. A more controversial demand is the introduction of the right to vote from birth onwards, to be exercised until the age of majority by the parents. This might allow the system to take into account that higher pensions, which may be demanded by a growing constituency of elderly voters, have to be financed by those who are currently young but who cannot (yet) vote.

8.3.3.2 Majority Systems

The translation of votes into seats in a representative assembly generally follows one of two possible models, although hybrids do exist. One model is the majoritarian system, where a candidate is elected if he receives a defined majority of votes. A country may, for instance, be divided into many small districts, each of which elects one parliamentarian.

> Districts or constituencies electing one representative each are called single-member constituencies.

Plurality Systems In a plurality system, the candidate with most votes is elected.

Absolute Majority Systems In an absolute majority system, a candidate will need more than half the votes.

If only one person is to be elected nationwide, such as in presidential elections, the system is necessarily majoritarian, but even then a plurality or an absolute majority or even higher supermajorities may be required.

> The French President is elected with an absolute majority of votes, and if no candidate achieves this in the first round then a run-off between the two strongest candidates determines the winner.
>
> The German President is elected (by an electoral college rather than by the people) by absolute majority, but if after two rounds no-one musters an absolute majority, then in the third round a plurality suffices.
>
> The US president is elected by an absolute majority of members of the Electoral College, and if no-one reaches that threshold then the fallback procedure is a special election by the House of Representatives.

Benefits Generally, a major benefit of the majoritarian systems is the link between members of parliament and the constituency where they are elected. This is thought to give citizens access to their representatives and makes them directly accountable to the district.

Also, it is mostly majoritarian systems that have the tendency to lead to a clear and workable majority after elections (because of voting behavior that favors two big parties, who alternate in size). That enables a distinct government and majority in parliament and allows for effective governing.

8.3.3.3 Proportional Representation

The other main model for election systems is proportional representation (PR), whereby the share of seats in the assembly is proportional to the share of the votes. Thus, roughly speaking, 20 % of votes will translate into 20 % of seats for a political party. In a purely list-based system, political parties then go on to fill their seats with candidates from the lists that they had established before the elections.

Benefit Generally, the benefit of a PR system is sought in the representation of many political sentiments in society; the idea of parliament here is to mirror the composition of the population in parliament.

Downside The downside, however, is that the parliament may be fragmented into too many political parties, which may make the formation of stable government coalitions more difficult. The imposition of a threshold will limit the fragmentation of the parliament, as only parties obtaining a minimum share of the vote (such as 5 %) are entitled to seats, yet this is at the cost of the parliamentary representation, as it leaves a share of the voting population unrepresented.

The choice, as authors have put it, is therefore between certainty and clear and effective governing, on one hand, and a representative parliament with negotiations between majority-seeking parties, on the other hand. In practice, many states have sought variations of the two systems in order to try to benefit from the advantages of both approaches.

8.3.4 Final Comment

In practice, electoral systems show the narrow link between politics, political parties, and constitutional law. We have noted before that politicians and politics decide the many choices left open by constitutional law. Here we note that political parties are very much involved in elections and the effects and outcome of elections. Constitutional law cannot be fully understood without a comprehension of politics, the political situation, and history. Similar constitutional systems may have different effects and lead to different outcomes and stability or success than others. Legal instruments may be copied, but political practice, political parties, political culture, customs and the interplay with other legal and constitutional agents, and (legal) education are a lot more difficult, if not impossible to copy, and yet these other aspects codetermine the success or failure rate of a constitutional model. In time, a constitutional model may have to change in its political and factual *modus operandi* due to changed circumstances. Sometimes institutions remain the same in name but change drastically in how they operate.

> The British Queen may be the Head of State and possess a variety of prerogative powers, but this description does not do justice to constitutional law and politics in the UK, which sets out that the Queen operates as the Queen in Parliament and that she may only act upon the recommendation of the Prime Minister.

The study of constitutional law therefore shows that, as have many examples given in this chapter, what are required are a comprehension of constitutional law in action and an understanding of the mechanisms of power, control, accountability, personality, and nonstate agents such as political parties.

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Administrative Law

9

Chris Backes and Mariolina Eliantonio

9.1 What Is Administrative Law?

9.1.1 From Police State to Welfare State

In everyday life, many things are not organized by private parties but by public authorities. To drive your car to school or university, you must have a driving license. While driving, you use public roads and cross traffic lights. You also pass sites where public authorities have permitted the operation of industrial facilities, while other areas have been designated as residential estates. Hopefully, the use of dangerous substances in industrial production processes is sufficiently controlled. If you study abroad, your certificates have to be recognized and you probably need a residence permit. Public authorities (who deal with a country's administration) play a role in all these matters. In order to be able to perform their tasks, public authorities (also described as administrative body or executive) need money. Therefore, raising taxes or other financial contributions is an important task for the administration too.

In the nineteenth century, the tasks of the state were mainly limited to maintaining law and order within the country and defending its territory against attacks from abroad. The idea behind this limitation was that public authorities should refrain from interfering with the rights and freedoms of citizens as much as possible.

After the industrial revolution, the tasks of the state shifted towards providing community services and distributing wealth among its citizens. This process was enhanced after several economic crises and, in particular, World War II. The tasks of the administration were no longer just defense and the maintenance of public order but also the provision of public goods and services.

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For instance, the state now granted social security benefits and sponsored theatres.

The nature of the state had changed from "police state" to "welfare state."

More recently, tasks like monitoring the quality of foodstuffs and food production, as well as the implementation of an immigration and naturalization policy, have also been added to the responsibilities of the administration.

In all these fields, administrative bodies perform public duties and exercise certain powers. To do so, there have to be administrative authorities and civil servants. They must be equipped with the power to raise taxes or to stop your car if you drive too fast. In making use of these powers, the administrative authorities are guided and bound by procedural rules and substantive requirements that serve to protect the interests of all parties concerned. When the administrative authorities use their public powers, they can interfere with your private rights and interests. Therefore, there must be legal remedies available to protect your rights and interests against the administration.

Topics of Administrative Law Administrative law is mainly about

- administrative authorities and their civil servants,
- how administrative authorities get public powers,
- procedural rules for the use of public powers,
- substantive requirements administrative authorities have to take into account when using their powers,
- objection procedures and judicial protection against administrative action.

9.1.2 Multilayer Governance

In any state, there are several levels of administrative decision making. Besides national ministries, regional authorities of different kinds and municipalities, as well as other local bodies, fulfill important administrative tasks. The organization and structure of such authorities, their competences, and their dependence or independence from national authorities differ considerably between countries. This is owed to differences in the organization of the national state (centralized or federal) and to different traditions and cultures.

In France, for instance, national authorities have quite strong powers to control and influence the *regions*, whereas in Belgium, many administrative competences are concentrated in the *gemeenschappen* and *gewesten*, and the competences of the central government are very limited.

In Germany, the *Länder* enjoy (limited) sovereignty; they are subjects of international law and therefore competent, within certain boundaries, to conclude international treaties with other states. The division of tasks and competences between the federation and the *Länder* is laid down in the German Basic Law (*Grundgesetz*) and hence can only be altered by amending the *Grundgesetz*.

In a unitary state like the Netherlands, the provinces can be (and will be, if the government does what it has announced in the recent 2012 coalition agreement) merged or totally dissolved through an act of parliament. Their tasks and competences are much more limited than those of the German *Länder*.

In 2007, Denmark abolished the 14 existing *Amten* and introduced five regions instead.

Together with the division of public powers between several territorial entities (central government, region, municipality), most countries have authorities specialized in certain subject areas, which often require specific technical knowledge and equipment. Examples are the British Environment Agency or the Dutch Water Boards (*waterschappen*).

Administrative tasks and competences are not only divided between several layers of administrative authorities within a national state. Nowadays, many administrative tasks are performed jointly by European and national authorities. Regional and national authorities often cooperate closely with the European Commission and European agencies. Examples of such cooperation can be found in the area of food safety and air traffic safety or in the designation of nature reserves that together form a European ecological network. Hence, administration is no longer a purely national affair but rather a joint venture of European, national, and regional authorities. This is referred to as multilayer governance.

9.1.3 Various Instruments and Powers to Protect the General Interest

In order to serve the general interest, the administration has various *instruments*—i.e., juridical and factual acts—at its disposal to put its policies into effect and to bring about legal consequences for individuals. The legislator can empower the administrative body to issue general rules, and it can also give the administrative body the competence to grant subsidies or permits and to take decisions in individual cases. In some cases, in order to achieve certain policy goals, the administrative body needs to perform factual acts.

For example, municipalities install litter bins and flower tubs to embellish streets and public places.

Competences In continental legal orders, a fundamental difference exists between competences under public law and competences under private law. In brief, public law competences are those competences that are exercised exclusively by public authorities. Therefore, competences under public law are competences that private law subjects (citizens, enterprises) cannot have, like the right to raise taxes or the right to issue residence permits to foreigners. Administrative authorities can have both kinds of powers. Besides competences under public law, which are typical for administrative authorities, private law acts, such as concluding a contract for the construction of a bridge, can also serve the general interest.

9.1.4 The Administration Within the Trias Politica

In the chapter on constitutional law, we already quoted Lord Acton, who in 1887 very aptly summarized the need for a division of power as follows:

> "Power tends to corrupt, and absolute power corrupts absolutely."

Trias Politica To avoid too high a concentration of power, the competences of the government must be divided between legislature, administration, and judiciary. According to Montesquieu's doctrine of the *Trias Politica*, the administrative (or executive) branch of power should be separate from the legislative and the judicial branches. In an ideal model of the democratic *Trias Politica*, the legislator is chosen by and is responsible to the people. The administration receives its powers only from the legislature. It executes these powers and is controlled by independent courts. See Fig. 9.1.

All European legal systems offer the possibility to go to court to challenge both juridical and factual acts of administrative authorities. The courts can check whether the executive remains within the limits imposed by law.

In a system with a thorough distribution of powers, the competences of the judiciary are limited. Mainly, courts may control whether the administrative body has acted within the confines of the competences attributed to it and the rules imposed upon it by the legislature. In any event, the courts are bound by the law and may not deviate from the decisions of the legislature. The executive is hence situated between the legislature, from whose acts it derives all its competences, and the judiciary, which controls whether the executive has remained within the confines of the law.

Take for example the construction of a new power plant in an industrial area. The legislator has laid down the requirements to be fulfilled in order to obtain an environmental permit and planning permission, both of which are necessary if you want to construct such a power plant. Environmental law prescribes the procedure of decision making and provides some general conditions. The administration applies the environmental statutes and follows the prescribed procedure, investigates and weighs all relevant interests, and determines the concrete conditions for the operation of the power plant. It issues the permit and afterwards monitors whether the operator complies with the conditions attached to it. If requested to do so, the courts assess whether the administration has correctly followed the procedural rules and applied all relevant legislation and whether all interests have been properly considered.

9.1.5 Questions

In the modern social welfare state, the public authorities are involved with almost every aspect of the daily life of individuals and in every area of society. The issues that administrative law deals with can be divided into two main categories. One

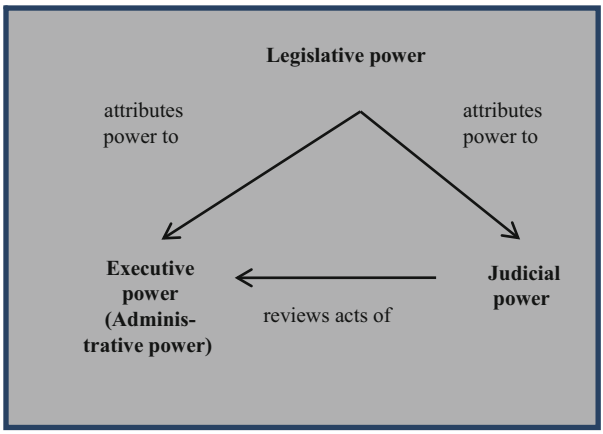

Fig. 9.1 Trias politica

category concerns the powers that administrative authorities need in order to fulfill their tasks and the conditions attached to such powers. It concerns what is called the *instrumental function* of administrative law.

The other category concerns the *safeguarding function* of administrative law. It deals with the protection of the rights and interests of citizens and of private organizations against the use of administrative power.

These two functions of administrative law correspond to two sets of questions that administrative law has to answer. The first set has to do with the rules that bind the administration in the execution of its tasks. The first question in this connection is when an administrative body has the power to act in a particular matter. This question is addressed in Sect. 9.2. The second question in connection with the instrumental function of administrative law concerns which rules bind the administration if it has the power to act in a particular matter. This is the topic of Sect. 9.3.

The second set of questions has to do with the supervision that the judiciary exercises over the administration. The first two questions in this connection are to what extent the judiciary is competent to review the acts of the administration and what it can do if it finds that the administration did not remain with the limits of the law. These two questions are the topic of Sect. 9.4, which also addresses two views on the function of administrative justice. Supervising the administration is a specialist task, and most countries have specialized judges to perform this work. This leads to a technical question of great importance, namely when an issue belongs to administrative law and falls under the competence of these specialized judges. This question is addressed in Sect. 9.5. Section 9.6 deals with the question of which persons can address the court when they think that the administration has done something wrong. Can everybody complain about every mistake, or should one have some kind of interest in the matter? Section 9.7, finally, discusses the remedies that are available in case a court finds an administrative decision to be mistaken.

9.2 Public Powers: Rule of Law and Legality Principle

In order to pursue public goals and general interests, the administrative authorities receive certain competences from the legislator. We will now deal with the left half of the *Trias Politica* scheme. See Fig. 9.2.

The principle of the rule of law underlies administrative law in all European legal systems. It can have slightly different meanings across the European legal systems, but its essence is always that the state is, at all times, bound by the law. The allocation and execution of powers are regulated by law, and the state must refrain from violating the law, including the basic rights of individuals.

Legality Principle A special requirement of the rule of law is the legality principle. Generally, this principle requires that the administration's competence to act must have a basis in legislation. The legislature should confer competences upon the administration to perform public duties and provide it with the power to interfere with the legal position of individuals. Administrative statutes hence provide for the legality of administrative acts. In this way, the legislature endows the administration with the necessary instruments to put its policies in various areas of society into effect and to serve the general interest.

Moreover, legislation should also set limits to the powers conferred upon the administration. Above all, this means that the administration is not allowed to use its competences for a different purpose than that for which they have been conferred.

> Take, for instance, the power of the mayor (in the Netherlands) to restrict the right to demonstrate in order to ensure public safety and order. The mayor may not prohibit demonstrations merely because he does not agree with the political statements of the demonstrators or the aim of the demonstration. The administration may not divert its competence from the purpose other than that which the legislator intended when creating the competence.

Détournement de Pouvoir The French call this the prohibition of *détournement de pouvoir*. Both the legality principle and the closely related prohibition of *détournement de pouvoir* bind the administration to the legislature, as the democratic representation of the people.

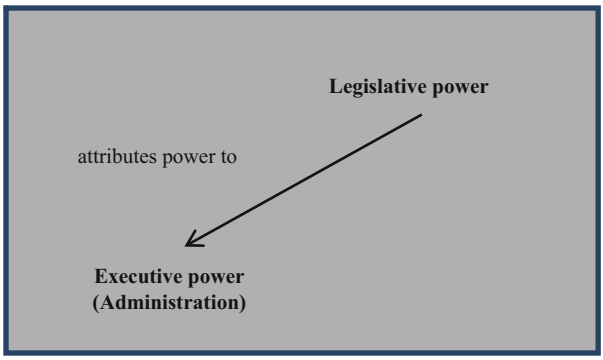

Fig. 9.2 Attribution of power

9.3 Procedural Rules and Substantive Requirements for the Use of Public Power: The General Principles of Administrative Law

9.3.1 Rationale of the General Principles: Preventing Abuse of Discretionary Power

As was mentioned above, the range of tasks and competences of the administration in various areas of society has grown enormously over the past decades. As a consequence, the administration's power to interfere with the rights and obligations of individuals has also increased. Administrative competences have grown not only in quantity but also in quality: compared to former times, administrative authorities today do not only have more powers to regulate various policy areas and to interfere with the rights of individuals; they also enjoy greater freedom in exercising these powers.

Tax Law How substantive the conditions for the use of public power are differs from one field of law to another. Tax law, for instance, prescribes exactly which percentage of your income has to be paid in income tax and what may be deducted from your income before taxes are calculated. Tax officers thus have relatively little leeway to weigh diverging interests when taking their decisions. They have, in other words, little discretionary power.

Land-Use Plans On the contrary, when a regional or municipal council draws up a plan for the use of land and decides whether a particular area will be designated as a residential or industrial estate or whether it is protected as a nature reserve, the statutory provisions empowering the administration to make this decision contain few concrete directives. Much is left to the administration, which should investigate all interests involved in the concrete case, weigh these interests, and take a decision.

Because the legislator is unable to regulate in detail which decision should be taken by the administration in any given case, administrative authorities enjoy much discretionary power. Therefore, the rights and duties of individuals who are affected by the land-use plan are not regulated concretely in legislation.

Fundamental Rights Whenever the administration must take decisions in concrete cases, it is not only bound by the conditions and limits explicitly mentioned in the applicable general rules. It also has to respect the fundamental rights of those affected by the decision, and it must take general principles of administrative law into account.

> When controlling an enterprise (enforcement of administrative law), an inspection agency has to respect the fundamental right of domestic peace and may not enter a dwelling without the permission of a judge. Furthermore, when entering the dwelling, the agency has to take the interests of the owner into account and has to act carefully in order to keep any impairment of his rights to a minimum (general principle of proportionality).

It was especially the need to prevent the abuse of highly discretionary powers that caused the evolution of general principles of administrative law. The function of these principles is to control the administration, to set limits to administrative action, and to provide generally applicable safeguards against the abuse of administrative competences.

Supervision by the Judiciary To some extent, one could say that the general principles of administrative law compensate for the frequent lack of concrete conditions and limits in the general rules that bind the administration. Moreover, with reference to the original idealistic model of the *Trias Politica*, one could say that this shift in function from legislation to general principles has caused a shift of power from the legislator, who is unable to formulate sufficiently concrete conditions and limits in specific legislation, to the courts, which can review the use of discretionary administrative powers by applying the general principles of administrative law.

9.3.2 Which Are the Most Important General Principles of Administrative Law?

Originally, the general principles of administrative law were developed in case law. Nowadays, however, there is a tendency in European legal systems to codify them, i.e., to lay them down in (general) statutory legislation. All European legal systems recognize more or less the same general principles of administrative law, although they may go under different names in different systems. The principles that are common to most European legal systems are:

1. the impartiality principle,
2. the right to be heard,
3. the principle to state reasons,

4. the prohibition of détournement de pouvoir,
5. the equality principle,
6. the principle of legal certainty,
7. the principle that legitimate expectations raised by the administration should be honored,
8. the proportionality principle.

Besides these principles, the European and national courts have acknowledged further principles that often can be understood as subcategories of the above-mentioned eight common principles and will not be dealt with here. In applying these principles to the acts and decisions of the administration in individual cases, the courts try to ensure that, even though the administration has certain discretion, some legal limits are imposed on the administration in the exercise of its powers. Applying the general principles of administrative law protects the rights and interest of individuals against abuse of public power and against an overemphasis on the general interest when public power is used.

9.3.2.1 Procedural Principles

Some general principles of administrative law are more of a procedural (or formal) nature, while others are more substantive. The procedural principles address the decision-making process and the way in which the interests of individuals are taken into account during this process. The first three principles mentioned above have a mainly procedural character. In every decision-making process, the administration has to act impartially.

> For instance, mayor and aldermen of a municipality should not favor members of their political party in deciding which construction firm will be granted the building of the new city hall.

When preparing a decision, the administration must investigate all relevant interests and hear all persons possibly affected by the decision.

> If somebody applies for a building permit, the neighbors should be given the opportunity to object.

When the decision is published, the authority should state the reasons that were decisive for the decision.

> It will not do if a province only informs an enterprise that it will not be granted an environmental permit without giving any explanation.

9.3.2.2 Substantive Principles

The latter five principles mentioned above may be qualified as substantive principles. Substantive principles impose certain requirements on the administration with regard to the content of the decision or measure.

As already mentioned above, authorities may use their public power only for the purpose for which it has been conferred on them (prohibition of *détournement de pouvoir*).

If in a regulation a competence to control vehicles is delegated to ensure traffic safety, the police is not allowed to use this power to stop cars in order to search for a murderer.

Decisions of the administration should (among others) be clear and understandable (legal certainty). Furthermore, they generally should not have any effect on events that occurred before the decision was published (no retroactive effect; this is another aspect of legal certainty).

For instance, the tax authorities should not suddenly modify the interpretation of tax rules, thereby retroactively attaching tax duties to events from the past that used to be tax free.

The decisions should not treat people unequally without having a legitimate reason to do so (equality principle).

If one restaurant owner is allowed to have seats on a terrace before the restaurant, another restaurant holder who is in a similar situation should also be allowed to have them.

Administrative decisions should not negatively affect the interest of people more than is necessary to achieve the proposed goal and should not lead to a clearly disproportionate result (proportionality principle).

If the administration establishes a violation of the rules on playing loud music in a bar it would be disproportionate to close the bar immediately. It can give a warning, though, and take measures if the violations continue.

Furthermore, if the administration raised legitimate expectations that a certain decision would be taken, it should, if possible, honor such expectations.

If a competent public officer informs a citizen that she will receive unemployment benefits because she satisfies all the conditions, and this citizen rents an apartment in the expectation that she will receive these benefits, it will not be easy to refuse the benefit because after all it turned out that the conditions for the benefit were not satisfied.

9.4 Judicial Review of Administrative Action

As we have seen, the rule of law means that the executive is bound by the law that governs the exercise of a specific power. Furthermore, the executive has to respect fundamental rights and must apply general principles of administrative law. However, administrative bodies are not infallible, and it is possible that they act in an unlawful manner.

This would, for instance, be the case if they use a power for a purpose other than that for which it was conferred, e.g. where a building permit is refused because the mayor does not want a political enemy to become his neighbor (*détournement de pouvoir*).

An administrative body can also act unlawfully outside the sphere of its public law powers. This is the case, for instance, when it closes a bridge for maintenance without

taking measures to safeguard the incomes of shop keepers in the neighborhood (violation of the principle of proportionality), or when it discriminates in accepting tenants for houses owned by the city (violation of the principle of equality).

The questions then are as follows: who can do something about this, what can be accomplished, and how can it be accomplished? These questions are the subject matter of the current and following sections.

9.4.1 The Power of the Judiciary to Review Administrative Acts

The judiciary receives its power from the legislator. See Fig. 9.3.

If we look at the task of the judiciary within the structure of the Trias Politica, we deal with the relation between the judicial and the executive powers (see Fig. 9.4).

To what extent does the judiciary have the power to review acts of the executive? We have seen that the answer to this question is, to a large extent, dictated by the doctrine of separation of powers and the way this doctrine is given shape in the form of the *Trias Politica*. The judiciary has the task to control the functioning of the executive, but in doing so it should remain within its own sphere and not take over the tasks that are assigned to the administrative body. We will see that this theoretical division of tasks is not always easy to implement in practice.

The actual implementation of the *Trias Politica* differs widely between national legal orders and deviates substantially from the theoretical ideal model. In practice, the legislator is often unable to describe the power conferred upon an administrative body in more than very vague terms and therefore grants broad discretionary powers to the administrative authorities. In such a case, in order to come to a decision, the administrative body has to identify all interests involved, balance them, and decide which interest will be given priority and to what extent. The outcome of this process therefore depends on the weight that the administration chooses to attach to each interest, within the framework conditions set by legislation. As the conditions prescribed by law are often quite vague and general, it is, to a large extent, not the legislator who decides about public rights and duties but the administrative body itself. Hence, administrative authorities do not only execute legal provisions, norms, and standards provided by legislation but also determine these norms and standards autonomously.

For example, environmental legislation by no means prescribes the permissible amount of emissions of hazardous substances to the air, or effluents to the water by industry. The reason is that the determination of this quantity largely depends on the circumstances of the individual case. The kind of industrial process in question, the age of the installation, the geographical conditions and the existence of recently developed environmental techniques all play a role. Because legislation by its nature deals with general rules, the executive is in a better position than the legislature to evaluate the details of concrete cases. For that reason, legislation mainly prescribes that the operator of a certain installation has to apply for an environmental permit. It is then up to the administrative body to attach conditions to the permit, which specify limits with regard to air pollution or the discharge of substances.

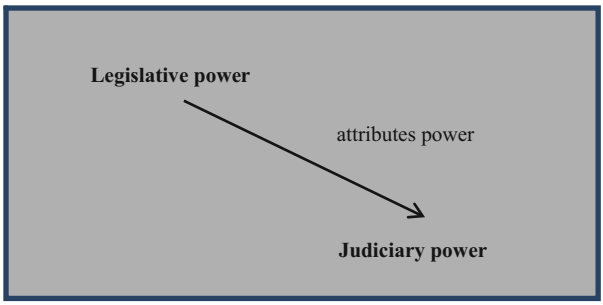

Fig. 9.3 Attribution of judiciary power

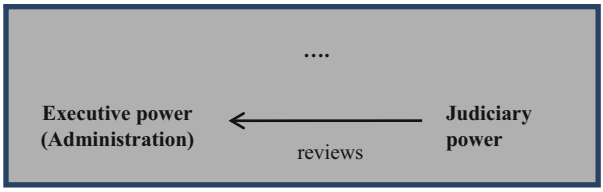

Fig. 9.4 Judicial review

Limitation of Administrative Competences In many countries, administrative courts assess not only whether the administration has remained within its competences but also whether it has adequately investigated and weighed all relevant interests and used its powers appropriately. However, which decision serves the public interest best is, first and foremost, a political and not a legal matter. Therefore, the decision must be based on a general framework set by the elected legislature. The decision in concrete cases is left to the executive, which obtains a competence to act from the legislature and is bound by the general framework. The courts, however, have no role in this; their task is merely to check whether the executive has remained within the limits of the law.

The principle of legality imposes limits on the competences of the administrative body. Fundamental rights and several general principles of administrative law (see Sect. 9.3) guide the process of identifying and weighing the diverse interests that must be considered in administrative decision making. Whether the administration has remained within its competences and whether it has observed these rights and principles in taking its decision are legal questions. Therefore, they can and must be examined by a court if an applicant requests the judicial review of the decision. However, whether the most suitable and advisable decision has been taken is a matter of policy, not a legal question, and hence is up to the executive. The legal question of whether all relevant interests have been taken into account and the outcome of the weighing is not disproportionate and the political questions as to

which decision is preferable are narrowly related, which makes the task of the administrative court a difficult one.

How exactly the powers between the legislator, executive, and judiciary are distributed and where the boundaries between these three functional entities of a state can or should be found are an ongoing and vividly discussed topic within each democratic state. Each country finds its own, to quite an extent, different answer to this question.

9.4.2 The Function of Administrative Justice

The view on the main purpose of administrative justice influences which individuals have access to the courts in administrative affairs and which remedies can be obtained by judicial review of administrative actions. Therefore, we must first answer the question of what the *function* of administrative justice is before we discuss who can challenge administrative action and what can be achieved by doing so. The answer to this question differs substantially between national legal orders.

9.4.2.1 The View on Administrative Law in the United Kingdom

In the UK, the very existence of administrative law as a separate branch of law has always been controversial, and for a long time its existence has been denied. According to the nineteenth century British constitutional scholar Albert Venn Dicey:

> the words "administrative law" are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation.

Dicey's views on administrative law have been very influential and meant that until quite recently there was no formal separation between private law and administrative law in the UK. The executive was subject to common law, and administrative disputes were dealt with by the ordinary courts and decided on the basis of the same rules that also govern the disputes between private actors.

> Consider again the example of a refusal to grant a building permit, inspired by the wish of the mayor not to have his political opponent as a neighbor. If the opponent filed a claim against an administrative body, this was originally treated in the UK analogously to a claim of one private actor against another for unlawful behavior.

The last years, however, have seen the emergence of separate courts for administrative matters and of special rules applicable to the executive.

9.4.2.2 Recours Objectif

In continental Europe, there are, broadly speaking, two main views of the function of administrative justice. It is, however, almost impossible to find them in their pure form. Rather, "elements" in the different jurisdictions are found, which may be traced back to one view or the other.

The first view of administrative justice, which, for instance, is to a large extent characteristic of the French system, is based on the notion of *recours objectif*. According to this view, the main aim of judicial protection against administrative behavior is to check whether an administrative body has acted lawfully and within the scope of its powers. Judicial review thus mainly serves a public interest, namely the interest that the executive should not act unlawfully. Of course, it is an individual who brings a claim before the court, and he or she does so in order to protect his or her own interests. And yet, in the view of *recours objectif*, this individual acts, in a way, as an "instrument" to allow the court to check the legality of the administrative behavior. The protection of the applicant's legal sphere is thus a by-product of the judicial review process, not its main objective.

> In the *recours objectif* view, the political opponent of the mayor who challenges the refusal of a building permit functions primarily as an instrument of the public interest that makes the administration use its competences for the purposes for which they were given. A possible "by-product" would be that the opponent also gets his building permit.

9.4.2.3 Recours Subjectif

The second continental view on administrative justice, which characterizes for instance the German system, is based on the notion of *recours subjectif*. According to this view, the aim of judicial protection against administrative behavior lies not so much in the check on the executive but in the protection of the individual's legal position. The primary task of a court that reviews administrative action is therefore not to determine whether the administration has acted lawfully but rather to determine whether the legal position of private actors has been violated. Of course, these two aims may partially overlap in some situations, but, as we shall see below (Sect. 9.6), this is not always the case.

> Consider again the example of a refusal to grant a building permit, inspired by the mayor's wish not to have his political opponent as a neighbor. If the opponent challenges this refusal before a court, he does so in order to protect his rights. Under the doctrine of *recours subjectif*, this would be the primary function of this lawsuit. That the administration is forced to comply with the demands of legality would merely be a welcome "by-product."

9.5 Organization of Judicial Review in Administrative Dispute

Regardless of the way in which a certain legal system understands the function of the system of administrative justice, most systems feel that there must be a way to control the actions and omissions of the executive. However, the way in which this system of control is organized varies greatly throughout the legal systems. In the following sections, we will explain the main variations in the systems of administrative justice and their rationales. In this connection, several factors need to be taken into account.

9.5.1 Preliminary Objection

The first factor to be taken into account is the existence of a system of preliminary objection with the administrative authorities.

Some countries, such as Germany, have opted for a system of compulsory preliminary objection. Before a claim may be brought before an administrative court, individuals must first ask the public administration to review the administrative measure that allegedly violates the individuals' legal positions.

Other countries, such as France, also use the system of objection, but they do not consider raising an objection as a necessary prerequisite for access to court. Other countries, finally, do not have a system of preliminary objections, and individuals have no way to complain about administrative action to an administrative body. Where this is the case, individuals can only appeal against administrative decisions in court or, as we shall see below, before other types of quasi-judicial bodies.

The aim of the system of preliminary objection is to ease the workload of the courts and to make sure that violations by the authorities are remedied in a speedy and efficient way. Furthermore, some legal systems allow an administrative body to change the measure challenged in an objection procedure: this might be impossible for the courts because of the doctrine of separation of powers and is therefore an advantage vis-à-vis judicial proceedings, at least from the perspective of an individual. The disadvantage of this system, however, is that it is the administrative body that will have to rule on the alleged unlawfulness of its own actions. Therefore, at least some doubts can be cast on the likelihood of the administrative body "changing its mind" and admitting its own error.

9.5.2 Specialized Administrative Courts

The second factor that can play a role in the categorization of the courts' systems is whether administrative matters are dealt with by specialized branches within general courts or by separate specialized courts. There are systems such as Germany that opt for review by specialized courts of administrative matters, while systems such as the Netherlands (in the first instance) or the United Kingdom opt for a review by specialized branches within the general courts.

> While it is not unthinkable that there could be no separate courts or separate branches for administrative disputes, this setup is highly unlikely given the complexity of administrative law.

Because of the complexity of administrative issues, which range from environmental law to migration law to spatial planning law to many more, many legal systems have opted for the creation of specialized administrative courts for some specific areas. For example, Sweden has environmental courts, and Austria has courts for migration and asylum matters.

Similar to specialized courts, but not completely comparable to courts, are Tribunals, which are typical for both the UK and the Irish administrative legal

systems. Tribunals are quasi-courts, and they fulfill a role that is similar to that of a court. However, they are highly specialized; there are Tribunals for social security and for environmental matters and also for matters relating to milk quotas only! Moreover, disputes are resolved not only by "real" judges, i.e. persons with a legal education, but also by lay people with a specific background in the subject matter of the dispute.

> In a way, one could say that what happens before a Tribunal is a hybrid between court proceedings and a preliminary objection before the administration.

The advantage of this system is the concentration of expertise in the Tribunal and the fact that there are very few procedural hurdles for applicants. It is quite easy to access Tribunals, and this ensures that individuals always have a forum that will hear their complaints. At the same time, however, because of their structure, doubts can be cast as to the impartiality of the members of the Tribunals. Many Tribunals, like the Irish Milk Quota Appeal Tribunal, are part of the respective ministry (which in this case is the Irish Department of Agriculture, Food and the Marine).

9.5.3 What Is an "Administrative Dispute"? The Public/Private Divide

If a legal system decides, as the vast majority does, to assign "administrative disputes" to either a specialized court or to a specialized branch within ordinary courts, it is faced with the question of what an "administrative dispute" actually is.

This question may seem quite straightforward for certain cases. Few would doubt, for example, that a claim against an order for the demolition of a building is an administrative dispute, as this measure represents the core of what administrative law is about: the possibility for the public administration to limit the legal sphere and the rights or interests of an individual in the name of the public interest.

The delineation of what an administrative dispute is, however, becomes more complicated when, for example, an administrative body has concluded a contract with a building company for the construction of a bridge. Does the matter then fall within the competence of the administrative courts because the public administration is one of the parties to this contract? Or should this matter be reviewed by the ordinary courts since, after all, the subject matter of the controversy is a contract between two entities and hence, in principle, a private law juridical act?

Agent Legal systems have adopted different solutions to this issue. Some legal systems, such as the British one, focus on the agent: here, every dispute will be qualified as an "administrative dispute" if the challenged action has been carried out by a body "exercising public law functions," regardless of whether the action constitutes a private law juridical act or a public law juridical act.

> So, if the London police department buys new police cars, this can lead to an administrative dispute.

Action Other legal systems, such as the Dutch one, focus not so much on the nature of the agent (i.e., the administrative body) but on the type of action that is at stake. Typically, these legal systems would assign only public law juridical acts that are not the creation or modification of rules to the jurisdiction of the administrative courts, while private law juridical acts (e.g., contracts) and the creation of rules would fall under the jurisdiction of the ordinary courts.

> In the Netherlands, a claim concerning a building permit can be brought before the administrative branch of the ordinary courts, but not a sales contract, nor a complaint about the content of a local regulation.

Focusing on the action, however, may lead to different results in different countries. In the Netherlands, the criterion is whether the action is a written decision of the administrative body for a concrete case based on a public law competence. The determining criterion in France is not whether the act is a written decision but whether the action in question can be qualified as a public service that is carried out on the basis of a public power.

> In France, even a claim regarding a contract between an administrative body and a private individual may be qualified as an "administrative dispute." This would, for instance, be the case if the administrative body is, with that contract, carrying out a public service such as the provision of bus services between two villages.

9.6 Standing

Once it is established that a matter is an "administrative matter" and it falls within the jurisdiction of a certain kind of court (be it a general administrative court, a specialized administrative court, or a specialized branch for administrative matters within the ordinary courts), an individual should seize a court of this kind if he or she wants to challenge the administrative action. However, having selected the appropriate kind of court does not necessarily mean that the claim will actually be dealt with. Before being able to plead their case before a court, potential applicants have to show that they have "standing." The concept of standing is linked to the idea that there should be some kind of "link" between the applicant(s) and the subject matter of the action.

Legal systems understand and qualify this necessary link in very different ways. In some situations, there is little disagreement between the legal systems. For example, if the applicant is the addressee of an administrative measure (because an order for demolition is directed towards the building of which he or she is an owner), it can hardly be doubted that there is a clear link between his or her legal sphere and the contested measure.

The existence of this link becomes progressively more blurred if one thinks, for example, of a father challenging the amount of disability benefits received by his teenage son or a taxpayer challenging a local tax imposed upon all residents of a municipality or a resident of a city challenging a measure that imposes the closure

of a certain street or an environmental NGO challenging the decision to open a nuclear plant in certain area where very rare birds nest.

For such situations, legal systems establish the necessary link in essentially two main ways, using the concept of either "interest" or "right." This choice is not accidental, but it is clearly connected to the different conceptions of *recours objectif* and *recours subjectif* (see Sect. 9.4.2). Legal systems that adhere to the conception of *recours objectif* will typically have quite liberal standing rules. If the aim of the system of administrative justice is to check the objective legality of the administrative action, it is in the interest of the legal system itself that a rather loose link between the applicant and the contested administrative action suffices for the applicant to have access to a court.

This link is the concept of "interest." In order to have standing, the applicant will only have to prove that he or she has an "interest" in the legal situation affected by the administrative action. This means that not only the addressee of a measure will be able to prove standing but also whoever can show that the consequences of the administrative action are of interest to him or her.

> For example, in case of a challenge against a license to open a nuclear plant, standing would be granted, in an interest-based legal system, not just to the individuals living around the affected area, but also to environmental NGOs who wish to protect citizens or the environment in general.

Conversely, legal systems that are based on the idea of *recours subjectif* will only grant standing to an individual where he or she can successfully demonstrate that the contested administrative action affects his or her rights.

> This means that it will be much harder, in the example made above, for environmental NGOs to bring a claim before a court, given that they will hardly be able to show that their own rights have been affected.

This rather restrictive approach, however, should not be judged in isolation. As we will see (Sect. 9.7), this restricted admittance to the courts goes hand in hand with relative extensive powers for the courts once the claim is declared admissible.

9.7 Remedies

Of course, one does file a lawsuit not only for being dissatisfied with the behavior of the public administration but also because one wants something. These demands, in technical terms, are called "remedies" or "actions." Some remedies are so inherent to the idea of judicial protection against the acts of public authorities that they are to be found in every legal system. Some others are only available under certain circumstances or with some restrictions or are available not before the administrative courts but only before general courts. If the latter is the case, this means that an applicant is forced to make that demand before an ordinary court even if the respondent is an administrative body.

The range of remedies available to administrative courts in the different legal systems does not vary accidentally but is the consequence of the rationale underlying the systems of administrative justice. If a system adheres to the view of a *recours objectif*, then it will typically grant courts only the powers that are strictly necessary to restore the legality of the administrative action. If a system embraces the idea of *recours subjectif*, it will provide the courts with more extensive powers, as the aim of the claim is seen in the protection of the individual's legal sphere.

9.7.1 Annulment

When an applicant complains about an allegedly unlawful restriction of his or her legal sphere by the executive, the appropriate remedy (and the most "typical" one in the systems of administrative justice) is annulment. The applicant will typically make this demand (or, in more technical terms, bring this action or ask for this remedy) against an administrative decision that restricts his or her legal sphere. Then he will ask the competent court to deprive the contested measure of its effects.

> Annulment is the equivalent in administrative law of what is called "avoidance" in private law. Annulment is only an option if the unlawful behavior of the executive consisted of a juridical act, because factual acts cannot be annulled.

An action for annulment may also be brought against a decision to deny a particular request. When this is the case, this only means that the measure (such as the denial to grant a license to open a restaurant) is annulled. It does not mean that the administrative body has been ordered to grant the license or to reopen the decision-making proceedings. It is even less likely that the court will grant the license itself.

9.7.2 Performance

Many legal systems allow individuals to ask the court to force an administrative body to issue a certain measure or to perform a certain activity, such as to repair a road, to pay a subsidy, and also to perform on its contractual obligations. For this purpose, many legal systems grant courts so-called injunctive powers. These are typical powers provided to courts in a legal system with the *recours subjectif* conception, as these powers are aimed at protecting the individual's legal position and not merely at restoring the objective legality of the administrative action. However, these powers are not completely uncontroversial: they may conflict with a certain understanding of the Trias Politica. Giving courts the power to issue (more or less) detailed binding orders to the executive may be regarded as an interference of the judicial power into the realm of the executive and hence a potential breach of the principle of separation of powers. The necessity to keep courts and administration separate from each other and the idea that courts should

not act as administrators have induced the legal systems that provide for this "injunctive" power to surround it with certain yardsticks.

In France and in Germany, for instance, courts are allowed to issue orders to the administration, but these orders may only have a specific content if there is only one way in which the administration may act.

> This is the case, for example, if there is no question about the amount of social security benefits that a person is entitled to. Then the court may order the administration to grant the benefits at that amount.

In all other cases, i.e. in case of discretionary decisions, courts are allowed to order the administration to act (i.e., to reopen the decision-making proceedings) but not to direct the content of the action.

> While this choice is undoubtedly respectful of the principle of separation of powers, it is certainly not the most efficient one, given that the issue will have to go back to the administration, which will have to start the decision-making proceedings anew. How to increase the effectiveness of judicial protection without violating the principles of the Trias Politica is a much-debated issue in many countries.

Conclusion

Administrative law mainly deals with the relationship between the executive and private persons and/or organizations. In a democracy, an administrative body is strictly bound by law. First, it needs powers to be assigned to it by means of legislation. According to the rule of law (legality principle), all competences of administrative bodies that interfere with the legal position of individuals must derive from legislation.

Second, in performing a task, an administrative body is bound by the specific rules that govern this task and more generally both by the fundamental rights of the private persons and organizations that are affected by the administrative actions and by the general principles of administrative law.

The judiciary has the task to check whether the executive remains within the limits imposed on it by law. Notably, separation of powers means that it should not check whether the decisions taken by an administrative body and its other actions are the optimal ones. This kind of evaluation of the administration's work belongs to political bodies that are democratically legitimated. Courts can check whether an administrative body complied with the law, by checking whether the administrative body had the power to perform a task, and whether it obeyed the rules and rights that govern the execution of the tasks of the administration.

The precise procedures by means of which courts can check on the executive differ from country to country. An important factor in this connection is whether a country has a *recours objectif* or a *recours subjectif* view on the function of administrative justice. In legal systems adhering to the first view, quite some persons and organizations will have standing, but the powers of the courts to provide remedies are more limited. In legal systems adhering to the second view, it is just the other way round.

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The Law of Europe

10

Jaap Hage

10.1 Introduction

10.1.1 Early History and Overview

Initiatives for European Cooperation The European Union (EU) resulted from transformations of earlier organizations, such as the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and Euratom. Moreover, it is the outflow of a series of events that was initiated by the Second World War. After this war had ended, politicians both inside and outside Europe saw cooperation within Europe as a means to lessen the chance of another war breaking out in Europe. Some saw the creation of a European federation as the way to accomplish this, but a full-blown federation, the "United States of Europe," was a bridge too far.

Other less ambitious projects for European cooperation did get started though. Belgium, Luxembourg, and the Netherlands had already created a customs union in 1944, the Benelux. The Organisation for European Economic Cooperation (OEEC) was established in 1948 in order to administer the Marshall Plan. This Plan was a means by which the United States offered financial help to the Western European countries in order to get their economies up and running again. In the east, the Soviet Union-led Council for Mutual Economic Assistance (Comecon) was created.

To defend the West against the perceived threat from the Soviet Union, a number of Western European countries joined the North Atlantic Treaty Organisation (NATO), a defense organization, alongside the United States and Canada, in 1949. As a reaction, Eastern European countries united under the guidance of the Soviet Union with the Warsaw Pact (1955).

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The year 1949 was also the year in which the treaty establishing the Council of Europe was signed. This Council, which counts the *European Convention on Human Rights* as its most famous achievement, was adopted in 1950.

> The Council of Europe must be distinguished from both the Council of the European Coal and Steel Community (ECSC), from the European Economic Community (EEC) and from (the Councils of) the EU, all of which will be discussed later.

Schuman Initiative Against this backdrop of events, which divided Europe into an Eastern and a Western part, a 1950 initiative of the French Foreign Minister Robert Schuman found fertile soil. Schuman proposed that:

> Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe.

This proposal was inspired by the desire to improve relations between France and Germany and to prevent a new war between these two countries by combining their coal and steel production outputs. Since coal and steel were crucial resources for warfare, uniting the production of these two resources would make a new war between the involved countries less likely.

To cut a long story short, the Schuman initiative led to the creation of the European Coal and Steel Community (ECSC) in 1952. The ECSC led to the creation of another cooperation, this time on economic policy, in 1958. It became the European Economic Community (EEC). The crucial difference is that while all the other organizations allowed states to cooperate while maintaining their full sovereignty, the ECSC, the EEC, the European Atomic Energy Community (Euratom), and later the EU were based on the idea that the participating states would transfer part of their sovereign powers to these new organizations. The organizations would not merely be "intergovernmental" ones—organizations in which states, through their governments, cooperate—but "supranational" ones or organizations that have powers over the participating states to some extent. By participating in these supranational organizations, the states involved took at least a step into the direction of a European federation. Opinions within Europe were, and still are, strongly divided about the size of that step and about the desirability, if not necessity, of taking more steps.

Spillover In this connection, the idea of "spillover" plays an important role. In general, spillover means that the full realization of one thing requires the realization of some other thing.

> The general idea of spillover is well illustrated by a pyramid of glasses. There is a continuous stream of water into the glass at the top and once this glass is full the water flows over into the glasses at the second layer, until the glasses at this layer are full and the water flows over to the glasses on the third layer, . . . and so on.

Functional Method When applied to the ECSC and similar organizations, spillover means that the realization of full cooperation in coal and steel production

requires other forms of cooperation. This could mean cooperation in the field of transportation, which again requires other forms of cooperation such as in the fields of road construction and maintenance, which in turn requires . . . etc. More generally, the idea is that the functions fulfilled by states are not independent from each other and that cooperation in the performance of one function "spills over" into cooperation in the performance of other functions, until finally . . .

And it is here that opinions diverge. Some hope and expect that the only way to realize cooperation in one important function inevitably leads to cooperation in (almost) all important state functions, which would in the end require political cooperation and perhaps also federalization. Others expect and hope that cooperation on one task can be kept isolated from other tasks and can be controlled by national states that can decide case by case whether and to what extent additional cooperation is desirable. The idea that full integration would be the outcome of a process of spillover from integration for one or more limited state functions has become known as the "functional method of integration."

Overview More than one perspective is required for a proper understanding of the EU. For instance, it is useful to know a little about historical development, at least from the origin of the ECSC to the EU in its present state. A brief overview of this development is provided in Sect. 10.2.

At the basis of the EU lies the vision that economic cooperation and European integration prevent war. This cooperation started with regard to coal and steel but soon broadened into the creation of one internal market. What the internal market amounts to is the topic of Sect. 10.5.

From the perspective of lawyers, history and economy may be important, but a lawyer's main focus stays on the law. The law of Europe has two sides. One side, addressed in Sect. 10.5, regulates the internal market; the other side regulates the EU itself and, in particular, its institutions. These institutions, their functions, and their powers are briefly discussed in Sect. 10.3, which deals with the sources of EU law, and Sect. 10.4, which deals with the EU institutions.

The final question that needs to be addressed is what this very development of the EU ultimately amounts to. In the final section, Sect. 10.6, recent developments around the "eurocrisis" are used to illustrate how spillover works and what its consequences are. It raises the question of whether the approach to European integration through an ever-expanding economic integration is desirable.

10.2 From ECSC to EU

10.2.1 The ECSC

The development that led to the EU started with the ECSC. The ECSC was founded in 1951 by six states: the German Federal Republic (West Germany), France, Italy, the Netherlands, Belgium, and Luxembourg. The organization had four institutions, counterparts of which are still present in the EU.

Institutions One institution was the *High Authority*. This was a kind of executive power with the task to implement the aims of the ECSC. It had nine independent members from the six participating states. The independence of these members is important. The High Authority represented the technocratic, supranational, nonpolitical aspects of the ECSC. It developed in the course of time into the Commission of the EU. Both the political and intergovernmental aspects of the ECSC were represented by the *Council*, a body consisting of representatives of the Member States, who represented the interests of the Member States. The two other institutions were the *Assembly*, made up of delegates from the national parliaments of the Member States, and the *Court of Justice*.

Supranational vs. Intergovernmental The above account of the institutions of the ECSC dropped the words "supranational" and "intergovernmental." These two words stand for a built-in tension in the ECSC and all the later European organizations. On one hand, the ECSC was meant to further a common interest of the participating states in the form of good policies concerning steel and coal production and—from a somewhat wider perspective—in the form of a contribution to the maintenance of peace through economic integration. These interests transcend the interests of the national states, albeit that these states of course also had an interest in good steel and coal production and in the maintenance of peace. Due to this focus on the general interest, it might be the case that the ECSC sometimes had to sacrifice the national interests of one of the Member States on behalf of the general interest. In the field of coal and steel production, the participating states had transferred some of their national powers to the ECSC, which allowed the ECSC the option of forcing these measures upon the states, if necessary and in the general interest. This is the supranational aspect of the ECSC, which also returned later in the EEC and in the EU.

Understandably, the participating states had some reservations about the possibility that a supranational organization would force its policies upon them. For that reason, they ensured that they had their say in the decision-making process of the ECSC. This influence was exercised through the Council. Through the Council, the participating states could steer the ECSC to make it a tool for furthering their national interests. This is the intergovernmental aspect of the ECSC, and it too returned later in the EEC and in the EU.

10.2.2 The EEC

In 1957, the six states that founded the ECSC founded two additional organizations with approximately the same setup as the ECSC, namely the European Atomic Energy Community (Euratom) and the EEC. Euratom will not be discussed, as it has never played an important role. On the contrary, the EEC is by far the most prominent organization of the three main supranational European organizations.

Limited Integration However, before the EEC was founded, two other plans for further European integration had faltered. Plans for a European Defence Community (EDC) and a European Political Community (EPC) were buried after the French parliament voted against the signed treaty for the EDC in 1954. At that time, a transfer of powers from the national states to supranational European institutions could only take place in the "limited" field of economics. Defense and politics, in particular foreign relations, were still too sensitive an area.

On January 1, 1958, the EEC came into existence. This organization had a structure that was comparable to that of the ECSC, with the same built-in tension between supranationality and intergovernmentalism, but it enjoyed a much broader range of functions. The aim of the EEC was specified in Article 2 of the EEC Treaty:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.

In 1967, the *Merger Treaty* unified the main institutions of the ECSC, the EEC, and Euratom. In 1992, the three communities were joined as "the communities" by means of the *Maastricht Treaty* or the *Treaty on European Union (TEU)*. These communities would be the supranational part of the EU, alongside two intergovernmental parts. The supranational part of the EU (the communities) and the two other parts were later connected by means of the *Treaty of Lisbon* (2007).

10.2.3 The European Union

The Treaty on European Union, signed in Maastricht in 1992, represented a substantial step in the direction of European integration. Perhaps the main development was the creation of the EU, a complex structure meant to promote European integration.

According to Article A, Section 2 of the treaty:

> This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen.

Article B mentions the objectives of the EU, which are, among others:

> To promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;
> To assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defense policy, which might in time lead to a common defense;
> To strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;

To develop close cooperation on justice and home affairs; . . .

When the Maastricht Treaty was signed in 1992, there were only 12 Member States. Since 1 July 2013, the EU has consisted of 28 Member States.

10.3 Sources of EU Law

Primary EU Law The law of the EU can be divided into two main categories. On the one hand, there are the treaties upon which the EU was founded. The most important treaties for the EU in its present form are the treaties of Maastricht (1992), Amsterdam (1997), Nice (2001), and Lisbon (2007). These treaties were concluded by the Member States of the EU. Together they form what is called the primary EU law.

10.3.1 Secondary EU Law

On the other hand, there is the law that was created by the EU itself. There are three ways in which the EU, through its institutions, can create binding legal effects, namely by means of regulations, directives, and decisions. Moreover, the EU can also give nonbinding recommendations and opinions (Article 288 of the Treaty on the Functioning of the European Union, TFEU). Together with the case law of the Court of Justice of the European Union, they form what is called the secondary EU law.

Regulations Regulations contain rules, just like "ordinary" legislation. They have general application and are binding and directly applicable in all Member States. This means that they directly create rights and duties for individual persons and organizations in the Member States.

An example is Council Regulation No 2531/98 of 23 November 1998 concerning the application of minimum reserves by the European Central Bank (ECB).

Directives Directives are a special type of legislation, directed to the Member States, obligating them to bring about a legal situation conforming to the contents of the directive in their national law. In a sense, directives contain rules, but these rules are not directly imposed by the EU. It is left to the Member States to implement them in their national systems.

An example is Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

By using a directive, rather than regulating an issue itself, the EU provides the Member States with the opportunity to make a national regulation that fits in the existing legal system. In light of the principle of subsidiarity (see Sect. 10.6.5), this is a preferable way of organizing the EU legal order. At the same time, directives

tend to be so specific that EU citizens and companies can count on directive-based law to be practically the same across other European Member States.

> For example, Article 5 of the above-mentioned Directive on the rights of Union citizens reads:
> "The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage."

Decisions Where regulations are meant to be general, decisions are typically meant for specific cases. A decision is binding, but decisions that specify their addressee(s) only bind that addressee(s).

> An example of a decision is Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran. In Article 9 this decision prohibited the purchase, import or transport of crude oil and petroleum products from Iran, as well as of petrochemical products.
> This decision also illustrates that, where content is concerned, EU decisions are sometimes hard to distinguish from regulations.

10.3.2 The Ordinary Legislative Procedure

If an EU rule creates the competence to make EU legislation, it also specifies which legislative procedure is to be followed. The procedure that is usually adopted is the "ordinary legislative procedure," which is described in Article 294 TFEU. In this procedure, the Commission, the Council, and the European Parliament must cooperate in order to create new legislation. If these three institutions agree, the procedure is quite simple:

1. The Commission submits a proposal to the European Parliament and the Council.
2. The European Parliament adopts its position and communicates it to the Council.
3. If the Council approves the European Parliament's position, the act concerned is adopted in the wording that corresponds to the position of the European Parliament.

If the Council and the European Parliament disagree, the legislative proposal may be sent back and forth several times between these two institutions and the Commission. The decision-making procedure within the Council may change from unanimity to qualified majority voting (see below). However, in the end, the Council and the European Parliament must agree if a legislative proposal is to be adopted.

Qualified Majority Voting The brief remark above that the decision-making procedure within the Council may change from unanimity to qualified majority

voting deserves separate attention because it marks a significant transfer of sovereignty from the Member States to the EU. After a crisis during the 1960s (the "empty chair crisis"), it was established that the decision-making procedure for the Council allowed every Member State to veto a decision. This vetoing power was also adopted for the Council; it guaranteed every Member State that EU legislation could not be imposed upon it against its will.

In the ordinary legislative procedure, which was only adopted under the Lisbon Treaty of 2007, it is possible to overrule a Member State. Member States do not have a say in the Commission, or in the European Parliament, although nationals of the Member States normally will participate in these two institutions. However, these nationals do not act on behalf of their home states. Therefore, if a Member State wants to block legislation, it must do so in the Council. However, the ordinary legislative procedure makes it possible to overrule individual Member States in the procedure with qualified majority voting.

> Article 16, Section 4 TEU:
> As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them, and representing Member States comprising at least 65 % of the population of the Union.
> A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

10.4 Main Institutions of the EU

The EU consists of several smaller organizations. The more important of these smaller organizations are called "institutions," and these institutions can still be subdivided into main institutions and "the rest." Here we will only discuss the main institutions, which are the

- Commission,
- European Parliament,
- European Council,
- Council of Ministers,
- Court of Justice of the European Union.

10.4.1 The Commission

The seat of the Commission is in Brussels. The Commission is led by the President of the European Commission, a function that is presently fulfilled by José Manuel Durao Barroso.

To fulfill its many tasks, the Commission avails over a bureaucratic apparatus of around 26,000 members (as it was in 2008).

Tasks Article 17 TEU describes the tasks of the Commission as follows:

> The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.
> It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.
> It shall oversee the application of Union law under the control of the Court of Justice of the European Union.
> It shall execute the budget and manage programmes.
> It shall exercise coordinating, executive and management functions, as laid down in the Treaties.
> With the exception of the Common Foreign and Security Policy (CFSP), and other cases provided for in the Treaties, it shall ensure the Union's external representation.
> It shall initiate the Union's annual and multi-annual programming with a view to achieving inter-institutional agreements.

As the first of these items indicates, the Commission is the institution within the EU that has the promotion of the general interest of the Union as its official task. To fulfill its central role in legislative procedures, the Commission must ensure that the treaties and other EU laws are applied. It has an important role in EU policy making.

Members Originally, every Member State of the EU had at least one representative in the Commission, but the number of Member States has increased greatly, and Article 5 TEU determines that the number of Commissioners in principle equals to two-thirds of the number of Member States. Although the Commissioner posts are still divided over the Member States, presently with still one Commissioner for every Member State, Commissioners are not representatives of their states: they are there to promote the general Union interest.

The Commission must answer to the European Parliament, and the Parliament has the power to dismiss the Commission.

10.4.2 The European Parliament

Tasks The European Parliament (EP) has three main functions:

1. It is involved in the legislative process.
2. It must approve the annual EU budgets (Article 314 TFEU).
3. It supervises the EU executive (the Commission and the two Councils).

These tasks are briefly described in Article 14, Section 1 TEU:

> The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

Members The current 754 members of the European Parliament (MEPs) are directly elected by voters in the EU Member States. The MEPs form groups in the EP along political lines rather than on the basis of the countries from which they stem. For example, the EP has large groups of Christian-Democratic (European People's Party) and Social-Democratic politicians (Progressive Alliance of Socialists and Democrats).

With the increasing number of Member States in the EU, there is a tendency for the EP to have more and more MEPs. This development has given rise to discussions about the proper composition of the EP and number of MEPs. The discussion has not been resolved completely yet, as is illustrated by the following formulation of Article 14, Section 2 TEU:

> The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats. . .

The EP has its seat in Brussels, Luxembourg, and Strasbourg. By way of a political compromise, the EP holds plenary meetings, on average once a month, in Strasbourg for a week and spends the rest of its time in Brussels where other meetings are held. The Luxembourg seat is used mainly for administrative purposes.

10.4.3 The Council of Ministers

Members The Council of Ministers, also called the "EU Council," consists of Ministers from the Member States. Which Ministers are included depends on the issue that is at stake. If, for instance, the Common Agricultural Policy (CAP) of the EU must be discussed, the Ministers of Agriculture will represent their national governments in the *Agriculture and Fisheries Council*. When monetary issues are at stake, the Ministers of the Treasury are the obvious participants in the *Ecofin Council*, while Ministers of Justice typically participate in the *Justice and Home Affairs Council*.

> Note that the Agriculture and Fisheries Council, the Ecofin Council and the Justice and Home Affairs Council are all instantiations of the same EU institution, the Council of Ministers.

Task The main responsibility of the Council of Ministers is to take policy and legislative decisions, often in cooperation with other EU institutions. Because the Commission is not as well staffed as national governments are, much of the real execution of EU policies must take place through the apparatus of the Member States. The EU Council functions as an intermediary between the world of Brussels and the national governments.

10.4.4 The European Council

Tasks Where the task of the Commission is to promote the general interest of the Union, the members of the European Council represent their national states in negotiations and decision making, which determines the general course of development of the EU. As Article 15, Section 1 TEU circumscribes it:

> The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

Members The members of the European Council are the Heads of State (or government) of the Member States; they are usually Prime Ministers, sometimes Presidents. These Heads of State are supplemented by the President of the European Council (who is not one of the Heads of State) and the Chair of the Commission (Article 15, Section 2 TEU). The current President of the European Council is Herman van Rompuy.

> The President of the European Council should not be confused with the President of the European Commission.

Eurosummits The European Council meets at least twice in every 6 months. These meetings are called the "Euro summits."

10.4.5 The Court of Justice of the European Union

The EU has its own Court of Justice, which is called the "Court of Justice of the European Union" (CJEU). This court is seated in the city of Luxembourg.

> The European Court of Human Rights, which is seated in Strasbourg, deals with the application of the European Convention of Human Rights. The ECtHR is a court connected to the Council of Europe (see Sect. 10.1.1) and is a different organization to the CJEU.

The CJEU consists of three courts: the (European) Court of Justice (ECJ), the General Court (GC), and the European Union Civil Service Tribunal. The latter court only deals with internal staffing disputes of the EU and will not be discussed here.

Both the ECJ and the GC consist of 28 judges, each from a different Member State. The judges are effectively appointed by their respective national governments for a mandate of 6 years.

Tasks The tasks of the two courts are manifold, but two important ones are

1. To give preliminary rulings concerning the interpretation of the TEU and the TFEU, and the validity and interpretation of acts of the institutions, bodies, offices and agencies of the EU (Article 267 TFEU).

If a national court of a Member State must decide a case where, for instance, the interpretation of the TEU or the TFEU is at stake, it must ask for a decision from the CJEU about the proper interpretation of these treaties. Such a decision is a preliminary ruling.

2. To review the legality of legislative acts, of acts of the Council, of the Commission, and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties (Article 263 TFEU).

Although the official competences of the two courts do not differ considerably, in practice the ECJ deals with matters that are important for the legal order of the EU, whereas the GC deals with cases that are more routinary by nature.

10.5 The Internal Market

The process of European integration, of which the EU is the outflow, started as a process of economic integration. However, the functions of the EU are not anymore limited to the promotion of economic integration through free trade. Above, Article B of the Maastricht Treaty was quoted, which illustrates that the objectives of the EU are much broader now than they originally were when the ECSC was founded. The same point can also be illustrated from the angle of human rights, at the hand of Article 2 TEU, which reads:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The EU performs many tasks, including foreign, monetary, environmental, agricultural, and fishery policies. It takes more than a single chapter to even provide a first impression of all these policy fields. Instead of trying to do the impossible, we will here focus on only one of them, the creation and maintenance of the internal market, recognizing that this focus may offer one perspective on what the EU does but cannot do justice to the broad spectrum of EU tasks and functions.

10.5.1 Advantages of Free Trade

Mutual Benefits Free trade between countries is good for at least two reasons. Firstly, free trade economically benefits all parties involved in this trade.

Suppose that there are two car sellers. One of them builds a certain kind of car for €9,000 and is prepared to sell it for €10,000. The other seller can only build the car for €10,500 and will only sell at €11,000. We assume that all other conditions and circumstances are the same. If there is free trade, a potential customer will buy the car for €10,000, thereby stimulating the first car builder to continue building cars. Both the seller and the buyer profit

from this deal. The second seller will not sell his car and will therefore not be stimulated to build more cars.
If the buyer and the second seller are in the same country, while the first seller is in a different country and for that reason is prohibited to sell the car to the potential buyer, the buyer must pay €1,000 "too much." Moreover, the expensive car builder will be stimulated to continue building cars, even if he cannot do so efficiently. Free trade stimulates the creation of products by those who can do so most efficiently, and promotes that consumers do not have to pay more than what is necessary. The money they save can used to buy something else, thereby stimulating the economy even more.

Preservation of Peace Secondly, if there is intensive trade between two countries that benefits the inhabitants of both countries—and we have seen above that it does—it is less likely that the two countries will wage war against each other. Both reasons are good reasons to have a single internal market within the EU, where potential traders are not hindered by boundaries between countries.

Four Freedoms To stimulate this single internal market, the EU has proclaimed the "four freedoms," the free movement of

1. goods,
2. persons,
3. services, and
4. capital.

10.5.2 Free Movement of Goods

Quantitative Restrictions The EU uses several approaches to encourage the free movement of goods. One of them is to prohibit quantitative restrictions on trade or—in general—movement of goods between EU Member States:

> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States (Article 34 TFEU).

Taxes Another one is prohibition of taxes, in a broad sense, on the transportation of goods from one Member State to another. Article 28, Section 1 TFEU states it as follows:

> The Union shall comprise a customs union which shall cover all trade in goods, and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

If the movement of a good from one country to another country is taxed, this raises the price of this good in the country to which it is moved. As a consequence, similar products that did not have to be imported can be relatively cheaper. This hampers trade between the two countries and therefore is forbidden.

Van Gend & Loos, (CJEU Case C-26/62)
The *Van Gend & Loos* case, which has become famous for other reasons (see Section 10.6.4), can illustrate this point. The Van Gend & Loos company imported a chemical

substance (ureaformaldehyde) from Germany into the Netherlands. According to the then valid Dutch law, this import was to be charged with an import duty. On 20 September 1960 Van Gend & Loos lodged an objection with the Inspector of Customs and Excise against the application of this duty in the present case. To this purpose, the company invoked the precursor of the present Article 28 TFEU. The European Court of Justice (ECJ) decided that the duty could not be applied.

"Other Measures" Another approach to facilitate the free movement of goods is to ban other measures that may hamper this movement. Such measures may, for instance, concern the specific characteristics of a good that tend to differ from one country to another.

Cassis de Dyon (CJEU Case C-120/78)
The German firm Rewe-Zentral AG wanted to import a fruit liqueur from France, which was named "Cassis de Dyon". The firm applied to the Bundesmonopolverwaltung für Branntwein (a section of the German Federal Ministry of Finance) for a permit to import this liqueur, but the permit was refused. The reason for the refusal was that the marketing of fruit liqueurs such as Cassis de Dijon is conditional upon a minimum alcohol content of 25 % in Germany, whereas the alcohol content of the product in question, which is freely marketed in France, is between 15 and 20 %. According to the CJEU this was not allowed because it violated the precursor of the present Article 34 TFEU.

The CJEU has decided that all trading rules enacted by Member States of the EU that are capable of hindering trade within the Union are to be considered as measures that have an effect that is equivalent to quantitative restrictions. This means that the scope of Article 34 TFEU is much broader than the formulation (quantitative restrictions) suggests.

10.5.3 Free Movement of Persons

For economic integration between different countries, a single internal market for goods is required, but it is also important that persons can freely move from one country to the other and are allowed to provide services in another country than where they originally came from. The free movement of persons and of services is meant to safeguard these possibilities within the Union. The core provisions of the TFEU that deal with the free movement of persons are as follows:

Article 44 TFEU:
1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment . . .

Article 49 TFEU:
Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of

> agencies, branches or subsidiaries by nationals of any Member State established in the territory of any other Member State.
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings . . .

To which kinds of situations do these provisions apply? Clearly they apply to nationals of one Member State who take up a full paid job in another Member State. They are allowed to take up residence in the country in which they work. But what if the job does not provide enough money to secure a living?

> **Kempf (CJEU Case C-139/85)**
> Kempf, a German national, entered the Netherlands on 1 September 1981 and worked there as a part-time music teacher, giving 12 lessons a week from 26 October 1981 to 14 July 1982. That did not bring sufficient money to live upon and therefore in the same period he applied for and received supplementary benefit under the "Law on unemployment benefit". Then, on 30 November 1981, Mr. Kempf applied for a residence permit in the Netherlands in order to "pursue an activity as an employed person" in that country. This permit was refused because Kemp had received state-provided benefits. The question was raised whether this would exclude him from the provisions of community law relating to freedom of movement for workers. The CJEU ruled that:
>
> "The provisions of community law relating to freedom of movement for workers also cover a national of a Member State who pursues, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter state, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine."

As this example illustrates, the criterion is whether a person who wants to reside in a Member State has a real job and not whether he can fully provide for his own subsistence. According to the Preamble of the Citizens Rights Directive:

> The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.

This covers the fact that the close relatives of citizens of the EU can follow if a citizen moves to another Member State.

10.5.4 Free Movement of Services

EU law does not only contain a freedom to move but also contain a freedom to provide and receive services. In principle, residents of one Member State are allowed to provide services in another Member State. As Article 56 TFEU states:

> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended . . .

What does this imply for practical purposes?

Van Binsbergen (CJEU Case C-33/74)
Van Binsbergen had a legal dispute before the Dutch court "Centrale Raad van Beroep" with the Dutch Board of the Trade Association of the Engineering Industry. In this dispute he wanted to be represented by a legal representative who originally lived in the Netherlands but who during the course of the procedure moved to Belgium. The issue at stake was whether this representative could continue his services to Van Binsbergen, since the Dutch law then contained a provision stating that only persons established in the Netherlands may act as legal representatives before the Centrale Raad van Beroep. The CJEU decided:

"... that the national law of a Member State cannot, by imposing a requirement as to habitual residence within that state, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable."

It is permissible to travel to other Member States in order to perform services, and it is also allowed to travel in order to receive services.

Luisi and Carbone (CJEU Cases C-286/82 and C-26/83)
Graziana Luisi and Giuseppe Carbone were fined by the Italian Ministry for the Treasury for taking more than the maximum allowed amount of LIT 500,000 abroad for the purposes of tourism, business, education and medical treatment. They contested the validity of the provisions of Italian law on which the fines were based, because the provisions would violate community law.

According to the CJEU, such transfers of money would be transfers in connection with the provision of services and therefore allowed.

10.5.5 Free Movement of Capital

If goods and services are to be distributed freely within the EU, it should also be possible to move capital from one Member State to another because if the goods and the services cannot be paid for, the freedom to move them across borders loses much of its value.

The free movement of capital is the most controversial among the four freedoms. In the original Treaty of Rome, which foresaw only a customs union to begin with, there was only an obligation to move towards integration of the capital market. Of course, some sort of further economic cooperation is necessary to create a single capital market in which there can be free movement of capital.

The Maastricht Treaty of 1992 finally introduced the development of a European Monetary Union, which led to the introduction of the single currency, the euro, in 2002. The Maastricht Treaty therefore also included the first real article on free movement of capital, now firmly enshrined in the TFEU. Article 63 TFEU declares that

1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

What this means in practice is illustrated by the Albore case.

Albore (CJEU Case C-423/98)
Two properties at Barano d'Ischia, in an area of Italy designated as being of military importance, were purchased on 14 January 1998 by two German nationals, who did not apply for prefectural authorization. In the absence of such authorization, the Naples Registrar of Property refused to register the sale of the properties to foreigners.

Mr. Albore, the notary before whom the transaction was concluded, appealed against that refusal to the *Tribunale Civile e Penale di Napoli*, claiming that the sale at issue, concluded for the benefit of nationals of a Member State of the Community, should not be subject to the national legislation which required only foreigners to obtain prefectural authorization.

According to the CJEU the notary was right in principle: without special reasons, this discrimination between Italian nationals and nationals of other EU Member States was not allowed.

As this example illustrates, the protection of the free movement of capital extends to the protection of transactions in which the movement of capital is involved.

An important aspect of the free movement of capital is the introduction of the euro and, more generally, the creation of the European Monetary Union (EMU). As is well known, this has led to serious financial and political problems within the EU. In the following sections, which aim to interpret the changes in Europe that are connected to the EU, the development of the EMU plays a central role.

10.6 Limitation of Sovereignty

10.6.1 Introduction

One of the obstacles that hindered the creation of a single market was that Member States of the EU had their own currencies. The United Kingdom had the English pound, Germany the Deutschmark, France and Belgium each their own francs, Italy its lira, Spain its peseta, etc. This would not have been problematic for trade had the exchange rates between these currencies been stable—but that was not the case. The value of the mark, for instance, tended to appreciate with regard to the other currencies, and the value of the Italian lira tended to depreciate. For a business that wants to trade, factors such as changes in exchange rates, uncertainty about their size and time, and costs of exchange make it less attractive to trade with businesses operating in countries with a different currency. In other words, the existence of different currencies with unstable exchange rates was an obstacle for the internal market. For this reason, the pursuit of an internal market spilled over into the pursuit of monetary integration and—after a period of transition—to the introduction of the euro as a common currency for an important group of EU members.

However, not all EU members participated, for different reasons. Some countries, such as the UK, wanted to stay in control of their own currencies. By manipulating the exchange rate of its currency, a country can influence import and export.

> For instance, a higher currency value makes one's products more expensive and leads to less export – but it makes importing cheaper and leads therefore to more import.

So having its own currency makes it possible for a country to influence its trade balance with foreign countries, and that can have a large impact on the national economy. Giving this up means giving up a large part of the power over one's national economy. Not all countries were willing to make this sacrifice in favor of a more smoothly functioning internal market.

Other countries were not allowed to participate in the common currency because their national financial households were deemed not to be solid enough. If a country has large and increasing national debts, it needs depreciation of its currency. If other countries have the same currency but do not want depreciation, this leads to problems. Therefore, participation in the euro was, at least in theory, bound to strict conditions on the national finance.

> Greece, for instance, was for some time not allowed to participate in the euro because it had to first do something about its national debt, tax income, etc.

As these examples about the UK and Greece illustrate, participation in the euro goes together with giving up some of a country's influence over its own finances. This is characteristic for much of the development of the EU. Monetary integration and the complications that go with it provide a good illustration of the development of the EU, the hurdles that must be taken, the seemingly unavoidable increasing transfer of sovereignty from national states to European institutions, and the resistance to which this leads. In this section, we will have a brief look at these developments because they offer us an overview of the EU from a somewhat bigger distance than the precise rules that govern the internal market and the functioning of the European institutions.

10.6.2 The Crisis

The period from 2008 until 2013 has been one of rapidly succeeding financial crises in the world, particularly in the EU. It started with the subprime crisis in the US, where banks had lent out large amounts of money to debtors who were insufficiently secure financially and could not repay their debts. As the claims that the banks had on their debtors were packaged in complex financial products and sold all over the world, the ensuing problems did not remain contained to the banks with the bad loans but were spread over the financial world. Banks threatened to collapse, and some actually did so. Governments felt compelled to support major banks with billions of euros because they were "too big to fail."

This transfer of very large amounts of money from national states to the financial world revealed that the financial position of all countries was not equally solid. Within Europe, Iceland, Ireland, Greece, Portugal, Spain, Italy, and Cyprus (and others) turned out, for different reasons, to have unstable government finances.

The latter five countries have the euro as their currency, which contributed to the complications. Firstly, the use of this currency made it possible to borrow money against lower tariffs than these countries were used to. This may have led to overspending because money was cheap. Secondly, these countries no longer used devaluation of their national currency as a means to overcome the problems. Such devaluation promotes export and diminishes import, which are both effects that tend to improve a weak national economy and boost employment rates.

The increasing national debts of these countries led to the depreciation of their credit rating by rating agencies, and to ever-increasing interest rates that had to be paid in order to (re)finance the government debts that were already large. To bring this development to a halt, the countries applied for help from, among others, the EU. However, this of course costs the other EU countries money. Some of them, in particular Germany, Finland, and the Netherlands, turned out to be unwilling to provide this help without the guarantee that the same mistakes would not be repeated. Such a guarantee could only be acquired if the Member States would be prepared to let other countries or the EU institutions check and, if necessary, correct their financial and socioeconomic policies. In other words, the possible solution to the debt crisis—that is probably a better name than "eurocrisis"—required that countries give up part of their sovereignty, presumably to the EU. This links the debt crisis to the development of the EU because giving up sovereignty tends to be a tricky matter.

10.6.3 Sovereignty and Direct Effect

10.6.3.1 Sovereignty

During the late Middle Ages and the centuries immediately following, two developments took place in Europe that led to the constitutional phenomenon of sovereignty. One development was that the power struggle between state and church was won by the state. In one territory, there would only be one supreme power: the power of the state. The phenomenon that a territory has one highest power is called "internal sovereignty."

The other development was that Europe was subdivided into independent countries. These countries were taken to be their own bosses, and interference from other countries was not allowed. One state should not interfere with the "internal affairs" of another state. States would be "sovereign," here in the sense of "external sovereignty," according to which states do not depend on each other in a political sense.

This combination of internal and external sovereignty lies at the heart of the "Westphalian duo". This is the theory that there are two kinds of law, each defined by the kind of actors for which the law is meant, the "addressees" of the law. On one

hand, there is national law, which addresses the inhabitants and nationals of a particular country. Because internal sovereignty means that the state is the single highest authority in a particular territory, it is up to the state to determine the contents of this law, either by making it in the form of legislation or case law or by not abolishing it by means of legislation. On the other hand, there is international public law, which addresses states and regulates the relations between them (see Fig. 1.2).

In this picture of two kinds of law, international law cannot have an institution that takes the role of the state in national law because states are externally sovereign. So it is not merely a matter of fact that there is no international legislator or an international judiciary. According to this Westphalian picture, it is impossible to be otherwise. An international counterpart of the legislature and the judiciary of national states would only be possible if states would give up their external sovereignty and thereby overthrow the Westphalian constitutional model, which took centuries to develop and which has lasted for centuries. And yet, this issue is presently at stake.

10.6.3.2 Law from International or EU Origin

If there are two kinds of law—international public law, which addresses states, and national law, which addresses citizens (and organizations)—the question arises as to how the two relate to each other. In theory, the answer to this question should be easy. Since public international law addresses only states while national law only addresses nationals, both kinds of laws would have their own addressees and interference or conflicts would not be possible. In practice, it is not that simple. There are forms of international law that indirectly affect nationals, such as human rights law and EU directives. If a state undertakes an obligation towards other states to protect human rights, is it then possible for citizens of that state to invoke these human rights for national courts? If an EU Member State has not yet implemented a directive, is it then possible to invoke this directive before a national court as if it were implemented?

Direct Effect These questions are traditionally labeled as dealing with the "direct effect" of international or—for that matter—EU law. The usual answer to them is that under certain circumstances, international regulations can be invoked by citizens for national courts. There is less agreement about the reason why this is possible.

From one perspective, the distinction between international law and national law is strict. Citizens of a country can only invoke national laws, and the judiciary of a country only has to apply national law. However, law that was originally of an international nature can become part of the national law, and then citizens can invoke it and courts will have to apply it.

Transformation If this approach to international law is adopted, a new question arises: how can law with an international origin become national law? Several answers are possible, and we will only mention the "extremes." In the UK, law with

an international origin can only become national law if it is explicitly "transformed" into national law by means of legislation. In the Netherlands, law with an international origin to which the Dutch state is bound "automatically" becomes part of the national legal system.

Global Legal System Another perspective was propagated by the Austrian philosopher of law Hans Kelsen (1881–1973), namely that the world has only one law, with local variations. These variations are comparable to the differences between the municipal law of the cities of Maastricht and Amsterdam in the Netherlands. The Netherlands is a unitary state and has one legal system. However, this system allows provinces and municipalities to arrange their own affairs within the boundaries of national law. This means that the parking regulation of Maastricht may differ from that of Amsterdam. However, the rules of, for instance, property law are the same everywhere in the Netherlands.

It is possible to apply the same view to the international legal system. There would be one global law, but there are local variations that correspond to national states or to federations or to districts, provinces, or municipalities. There need to be "conflict rules" that specify which rule is applicable if there seems to be more than one applicable rule for a particular case. Yet most of the time, the content and scope of the rules themselves determine whether a rule is applicable. French rules usually do not claim to be applicable to cases in the US, just as the law of the city of London does not claim to be applicable in the city of Manchester. From this point of view, the Westphalian duo is rejected. There is one global law, even if there is sometimes a need for conflict rules that deal with potential conflicts between rules.

According to their national rules, most, if not all, states adopt the first view of the law and adhere to the Westphalian duo. They assume that a law with an international origin needs to be incorporated in their national systems if it is to be applicable to national courts and that it is their national laws that determine whether and how such incorporation is to take place. One of the interesting things about EU law is that it seems to reject this approach.

10.6.4 Van Gend & Loos and Costa/ENEL

The question how the law of the EU (then called the EEC) related to the national laws of the Member States was answered by the CJEU in a ground-breaking decision in the *Van Gend & Loos* case (CJEU Case C-26/62). When the case came before the CJEU at the beginning of the 1960s, the precise nature of this relation was still unclear. The Member States may have even thought that it was clear, namely in accordance with what their national laws said about it. It turned out, however, that the CJEU was of a different opinion.

10.6.4.1 Van Gend & Loos

The Van Gend & Loos company imported a chemical substance, ureaformaldehyde, from Germany into the Netherlands. According to the Dutch

law that was valid at the time, this import was to be charged with an import duty. However, according to the EEC Treaty, new duties on trans-border transport of goods within the EEC were not allowed. Article 12 of the Treaty of Rome, through which the EEC was founded (now replaced by Article 28 TFEU), reads:

> Member States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

The question was whether Van Gend & Loos could invoke this prohibition against the Dutch state before a Dutch court. Note, however, that the real import of this case is much wider than merely the tax issue between Van Gend & Loos and the Dutch state. The real import concerned the relationship between Dutch national law (and the national law of other members of the EEC for that matter) and EEC law.

The CJEU was consulted in this case by a Dutch court (the "Tariefcommissie") to provide a preliminary ruling on the content of EEC law. The CJEU had to answer, among others, the following question:

> Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a state can, on the basis of the article in question, lay claim to individual rights which the courts must protect.

As part of its answer to this question, the CJEU wrote (numbers added):

1. The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may, on the basis of this article, lay claim to rights which the national court must protect.
2. To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.
3. The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the community are called upon to cooperate in the functioning of this community through the intermediary of the European Parliament and the Economic and Social Committee.
4. In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals.
5. The conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.
6. Independently of the legislation of Member States, community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty

> imposes in a clearly defined way upon individuals, as well as upon the Member States and upon the institutions of the community.

The CJEU actually interprets the first question as two questions:

a. whether nationals of Member States derive rights from Article 12 of the EEC Treaty and, in case this first question is answered in the affirmative,
b. whether national courts of the Member States must protect these rights.

Apparently, the CJEU takes it that an affirmative answer to the first question automatically leads to an affirmative answer to the second one.

Under (2), the CJEU takes a crucial step. It assumes that it is not only the wording of international treaties—and therefore also of the EEC Treaty—that determines whether nationals can derive rights from them but also the "spirit" and the "general scheme."

Under (3), the CJEU continues by identifying the objective of the EEC Treaty. This objective is to establish a common market, the functioning of which is of "direct concern to interested parties in the community." By mentioning these parties, the CJEU creates room to make Article 12 of the EEC directly applicable.

According to the Court, the objective of the EEC Treaty would become apparent from the preamble to the treaty, from the fact that the institutions of the EEC were endowed with "sovereign rights," and from the fact that the Treaty calls upon the nationals to cooperate in the functioning of the community. This last point is meant to clarify the fact that the EEC Treaty does not only address the Member States but also address their nationals. In other words, this Treaty is not just an agreement between states but something that concerns both states *and* their nationals.

Under (4), the CJEU first draws the intermediate conclusion that "the States have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals."

To draw this intermediate conclusion, the Court adduces still another premise, namely that the task assigned to the Court of Justice—the object of which is to secure uniform interpretation of the treaty by national courts and tribunals—confirms that the states have acknowledged that community law has an authority that can be invoked by their nationals before those courts and tribunals. This premise implicitly answers question (b) above, about whether national courts must protect rights derived from the EEC Treaty, in the affirmative.

Under (5), the CJEU takes a decisive step. It states that the community *constitutes a new legal order of international law* for the benefit of which the states have limited their sovereign rights, and the subjects of which comprise not only Member States but also their nationals.

With this step, the CJEU states that nationals of the Member States do not derive their rights from national law, as the Member States assumed; they derive their rights immediately from the EU law. The states have themselves limited their sovereign rights for the benefit of this new legal order. The EU legal system exists, thanks to the willingness of the states to give up a little of their sovereignty.

However, under (6), it becomes clear that community law can give nationals rights (and impose duties upon them), *independently of national legislation*. Moreover, in case this were not sufficiently clear, the CJEU adds that these rights do not only arise where they are expressly granted by the Treaty but also arise by reason of obligations that the Treaty imposes in a clearly defined way upon individuals, as well as upon the Member States and upon the institutions of the European community. In other words, the transfer of sovereignty does not even have to be explicit; it has taken place by creating a community with a particular purpose. If rights follow *by reason of* obligations imposed by the Treaty, they also exist. The EEC Treaty has had a bigger impact than the parties may have had in mind. According to the CJEU, they may have "transferred" more sovereignty than they first realized.

10.6.4.2 Costa Versus ENEL

As if the CJEU decision in the *Van Gend & Loos* case were not revolutionary enough, the CJEU added to it in its decision in the case between Flaminio Costa and ENEL (CJEU Case C-6/64). In this case, the question arose whether EU (EEC) law could be set aside by later national legislation.

In this connection, the CJEU wrote the following (numbers added):

> 1. By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States, and which their courts are bound to apply.
>
> By creating a community of unlimited duration having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the Member States have limited their sovereign rights (albeit within limited fields). They have thus created a body of law which binds both their nationals and themselves.
>
> 2. The integration into the laws of each Member State of provisions which derive from the community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty.
>
> The obligations undertaken within the framework of the treaty establishing the community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.
>
> It follows from all these observations that the law stemming from the treaty – an independent source of law – could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law, and without the legal basis of the community itself being called into question.

Under (1), the CJEU restates its position in the *Van Gend & Loos* decision. It adds that the legal system created by the EEC Treaty became an integral part *of the legal systems of the Member States*, which their courts are bound to apply. This seems to be a step backwards. It is difficult to combine this with the view set out in

the immediately subsequent paragraph that the Member States have limited their sovereign rights.

Under (2) follows the decision for which the case has become famous: states cannot override the law of the treaty by means of later national legislation. If they could, the resulting law might vary from Member State to Member State and the obligations undertaken through the treaty would become conditional on not being derogated from by a later national law.

10.6.5 Subsidiarity and the Requirement of Legal Basis

In the *Van Gend & Loos* and *Costa/ENEL* cases, the CJEU claimed solid ground for EU law as a legal order in itself, the rules of which apply directly in the Member States and override the national rules. This went together with strong claims concerning the sovereignty that the Member States would have transferred to the EU (the EEC).

Where the CJEU strongly pulled the Union into the direction of supranationality, the Member States have sometimes been reluctant to follow. The EU may have powers that prevail over those of the Member States but only in those fields in which the Member States have transferred those powers to the EU. If the EU is to perform juridical acts and change the legal positions of the Member States and their nationals, it must, like all other legal agents, have received the appropriate competence. By limiting this competence, the Member States can limit the powers of the EU institutions and try to control the transfer of sovereignty from the Member States to the EU.

The limitations of the powers of EU institutions take the shape of two demands on the exercise of these powers that were imposed on the EU in the treaties:

1. powers can only be exercised within the limits of the competences conferred upon the Union (Article 3, Section 6 TEU),
2. the use of these competences is governed by the principles of subsidiarity and proportionality (Article 5, Section 1 TEU).

Legality This means that the EU has only those competences that were attributed to it, and no other. This is essentially the principle of *legality*, which holds in general in public law. In its application to the EU, it is sometimes called the demand of a legal basis.

Subsidiarity Moreover, the EU should only use its powers where it can perform a task better than the Member States could do themselves. For example, the EU should only limit the use of alcohol if a central regulation is better than national regulations. This is the principle of subsidiarity.

Proportionality Moreover, the EU should only act if the

1. adopted measure is suitable to achieve the desired end,
2. measure is necessary to achieve this end, and
3. measures it takes are not worse than the problem it wants to address with this measure.

Together, these three demands fall under the principle of proportionality.

The demand for a legal basis in combination with the principles of subsidiarity and proportionality together limit the powers of the EU and impose a limit on the amount of sovereignty that the Member States have transferred to the EU.

10.6.6 The Principle of Loyalty

Since the beginning of European cooperation in the 1950s, Member States have transferred powers in increasingly more policy fields to "Europe", powers that originally belonged to the sovereign sphere of the states. This means that Member States should refrain from acts that disturb or impede the process of European integration and also that they should be cooperative with regard to the EU, its institutions, and its law. This is expressed in Article 4, Section 3 TEU:

> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.

Moreover, according to Article 291 TFEU, Member States are under an obligation to adopt all measures of national law necessary to implement legally binding Union acts. This obligation applies to all state organs, both horizontally (legislature, administration, and judiciary) and vertically (national level, districts, provinces, and municipalities).

Implications for Legislature and Administration If a state is an EU member, this means a partial loss of power for its national legislature and administration since these powers have been assigned to, or limited by, the EU. In addition, the law of Europe limits the autonomy of the legislator and the administration since they must take care not to violate their European obligations in the exercise of their national competences. Moreover, they are obligated to transform European directives into national legislation, to take the required executive measures—for instance, by appointing bodies that must apply EU law in concrete cases and by assigning these bodies sufficient staffing, budget, and powers—and to uphold the law of Europe.

Implications for the Judiciary National judges are obligated to cooperate with the law of Europe and to apply it correctly in concrete cases. In this way, they play

an important role in upholding and guaranteeing legal protection within the European legal order. European legal instruments that are unconditional and sufficiently clear can be invoked in procedures before national courts, and the courts must give precedence to this European law over national law that might conflict with it. In this way, national courts check whether the national legislator and administration have acted within the scope of their European obligations and protect the rights that individuals derive from the law of Europe.

10.6.7 Euroskepticism

The process of European integration has not passed without criticism. Already in the early 1950s, treaties for a European Defence Community (EDC) and a European Political Community (EPC) were abandoned after the French parliament refused to approve the EDC. However, during the first decades of its development, the EU was generally supported.

Treaty Establishing a Constitution for Europe This natural seeming support lost much of its obviousness when at the beginning of the twenty-first century an effort was made to provide the EU with a constitution of its own. The governments of the EU Member States signed the *Treaty establishing a Constitution for Europe* (TCE) on October 29, 2004, and the TCE was subsequently ratified by 18 from the then 25 Member States. There turned out to be substantial popular resistance against the adoption of the TCE, however. Members of the European Parliament founded a new group "Independence and Democracy" with rejection of the TCE as its main objective. The resistance against further European integration became also manifest when the TCE was rejected by both the French and the Dutch population in referenda about the ratification of this treaty. As a consequence, the attempt to adopt a constitution for the EU was, at least temporarily, abandoned.

Although many provisions of the rejected TCE returned in the Treaty of Lisbon, the spirit of euroskepticism did not go away anymore. The group "Independence and Democracy" in the EP became "Europe of Freedom and Democracy" after the elections of 2009 and counted 35 members at the beginning of 2014. In many Member States of the EU, there are political parties that are skeptical about (more) European integration, and these parties gain more and more adherents. A 2012 survey conducted on behalf of the European Commission showed that only a 42 % minority of the inhabitants of the EU think that the interests of their country are looked after well in the EU. Moreover, only 31 % of the population has a positive image of the EU, while 28 % have a negative image.

Hard and Soft Euroskepticism Euroskepticism comes, by and large, in two variants. In its "hard" variant, euroskepticism fundamentally objects against European integration, as this would threaten the national state and its sovereignty. In its "soft" variant, euroskepticism is inspired by the wish that the EU would function differently. In this connection, among others, the alleged lack of

democracy within the EU, the effects of the free market policy of the EU, and the "eurocrisis" and its proposed solutions are adduced as reasons against (more) European integration.

10.6.8 Sovereignty and the Debt Crisis

We have seen that in the early years of European integration, the CJEU took several important steps towards positioning the EU (actually its predecessor, the EEC) as a supranational entity, able to make law that binds the Member States.

There have also been developments in the other direction. The most obvious one is the rise of the European Council, the collection of Heads of State of the EU Members, as an institution of the EU. It is becoming the institution where the main developments of the EU are negotiated. It is, for instance, the European Council that proposes to the EP a candidate for the position of president of the Commission. Since decisions in the European Council are taken unanimously, this means that all Member States practically have a vetoing right concerning all major decisions on the further development of the EU.

Another illustration of the important role of the European Council is the frequent meetings of this Council on the debt crisis. During one of these meetings, decisions were taken about the use of an emergency fund to support EU Member States with financial difficulties. There should be European (instead of national) supervision of the banks. Indeed, the possibility was contemplated that steps be taken towards a closer fiscal union. Obviously, the latter two measures would involve major concessions concerning the sovereignty of the Member States.

The debt crisis and proposals for solving it illustrate part of what is happening in Europe. In order to obtain peace and prosperity, European countries strive for an internal market. In order to remove obstacles for this market, it was deemed desirable to introduce a common currency, the euro. This is an example of how economic integration spills over into financial integration. The existence of the euro as a common currency may not have been the direct cause of the crisis, but it withheld at least some countries from taking a relatively easy way out in the form of devaluating their national currencies. In order to maintain the euro as a common currency, special measures turned out to be necessary, measures that once again undermine the sovereignty of the Member States of the EU. In theory, all Member States can veto these measures because decision-making about them takes place in the European Council where all Member States have a vetoing right. However, if an emergency becomes very serious, as is the case with the crisis, the right to veto important decisions is more theoretical than practical. The crisis and the way it is presently handled—with difficult negotiations, loss of time, but finally ending up in more integration and less sovereignty—show how Europe will continue to develop, unless . . .

. . .Unless it breaks up. There is no guarantee that the gradual process in which Europe step by step approaches the federal structure that was still unattainable after the Second World War will continue. The rise of euroskepticism makes this

patently clear. These are eventful times, but the development of the EU has known even more eventful times. On these earlier occasions, the Union survived and came out of the tribulations with more integration rather than less. However, as we all know, "past performance is no guarantee of future results."

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International Law

11

Menno T. Kamminga

11.1 Introduction

Traditionally, two kinds of law are distinguished. On the one hand, there is national or domestic law, which deals with legal relations within the territory of a single state and with the organization of that state itself. On the other hand, there is international law (sometimes called "public international law"), which deals with the legal relations between states.

> This traditional account is essentially a description of the "Westphalian duo" that was discussed in Sect. 1.5.

The sharp distinction between national and international law may have been adequate in the past, but it is under increasing pressure. It is, for example, a mistake to assume that states are free to adopt whatever laws they like. In European countries, a large percentage of domestic laws and regulations currently originates from Brussels. But much of European Union law in turn originates from Geneva, New York, or Nairobi. Whether they are international trade and investment rules, Security Council sanctions or greenhouse emission standards, legal standards are increasingly devised at meetings of international organizations or ad hoc international conferences around the world instead of in domestic capitals.

The interplay of rules and measures stemming from institutions at different levels may be illustrated by the so-called *Kadi* case. The case provides an example of the interplay between the United Nations Charter (under which financial sanctions were imposed on Mr. Kadi), domestic law (under which the sanctions were implemented), EU law (under which the sanctions were first transformed and then nullified), and the law of the European Convention on Human Rights (ECHR),

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on the basis of which it was decided that Mr. Kadi's human rights had been violated.

The Kadi case

In 2001 the UN Security Council decided that the assets of Yassin Abdullah Kadi, a Saudi businessman, should be frozen on suspicion that he was financially supporting terrorist activities. The Security Council has established a procedure under which the assets of persons suspected of financing the terrorist activities of Al-Qaeda and the Taliban may be frozen. The identification of suspects takes place behind closed doors on the basis of information provided by intelligence services and there is no trial. Persons that are put on the sanctions list are not informed of the measures taken against them. They simply find out one day that they can no longer withdraw money from their bank accounts. Decisions are binding on the member-states of the United Nations, meaning that states are required to implement the sanctions immediately. Article 103 of the UN Charter provides that obligations under the Charter prevail over any other treaty obligations states may have. Within the European Union Security Council sanctions are transformed into EU Regulations and thereby also become binding on EU Member States under EU law.

In various court proceedings Mr. Kadi attempted to challenge the sanctions imposed on him. Initially this was in vain, but in 2008 the Court of Justice of the European Union (at that time known as the European Court of Justice) annulled the EU Regulation imposing the sanctions against him on the ground that he had not been informed of the evidence against him and therefore had not been able to challenge that evidence. Under the law of the European Convention on Human Rights – that has been incorporated into EU law – anyone charged with a criminal offence is entitled to be informed of the charges against him and to defend himself.

The *Kadi* case illustrates another shortcoming of the traditional account according to which international law is merely concerned with the legal relations between states. Although the case concerns the legal position of an individual citizen—a situation traditionally regulated exclusively by domestic law—it nevertheless turns out to be largely governed by international and European law. Apparently, international law is not merely a legal system governing relations between states but rather a legal system that also addresses individual citizens. In Sect. 11.2, we will see that it also addresses other nonstate actors.

11.1.1 The Topics of International Law

International law deals with many different topics, which include but are certainly not confined to relations between states. Some of these are as follows.

War and Peace Perhaps the most traditional topic of international law has been the laws of war and negotiating peace to resolve conflicts between states. The well-known 1949 Geneva Conventions on humanitarian law with their Additional Protocols and the 1993 Chemical Weapons Convention are international agreements on what are lawful and unlawful means of waging war by states. Nowadays, the United Nations take a central role in safeguarding international peace and security, especially through its Security Council.

The Sea Shipping and the use and exploitation of the sea are traditional topics of international law. Questions that are addressed by the international law of the sea are the following:

- Which restrictions may be imposed on shipping?
- Which activities are allowed on the high seas and coastal zones?
- Are states permitted to exploit the seabed?
- Which states have fishing rights in a particular area of the sea, and how many fish can they take per year?

Many of these questions are covered by the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

The Environment Environmental issues such as global warming, the emission of greenhouse gases, and the pollution of water and the atmosphere transcend the domain of national states. They are therefore also regulated by treaties negotiated between states, such as the Kyoto Protocol on climate change and global warming, the POP Air Pollution Protocol regulating trans-boundary organic pollutants, and the MARPOL conventions regulating maritime pollution from ships.

Economic and Financial Relations As has become abundantly clear over the last few decades, both trade and finance are no longer issues that can be exclusively dealt with at the national level. The World Trade Organization (WTO), the World Bank, and the International Monetary Fund (IMF), organizations governed by international law are examples of the crucial role of international law in the sphere of economic and financial relations.

Crime Crime and criminals are not confined by national borders. Crimes may have international aspects (e.g., trafficking in drugs), and criminals may move from one country to another to commit their crimes and to escape arrest. The combating of crime therefore requires international cooperation, such as the 2000 UN Convention against Transnational Organised Crime, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and an international organization such as INTERPOL (the International Criminal Police Organisation).

Human Rights Human rights are rights held by individuals vis-à-vis states. The 1948 Universal Declaration of Human Rights proclaimed that human rights are universal, but the text was not adopted by consensus. Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, Ukraine, and Yugoslavia registered their disapproval by abstaining from voting in favor of the Declaration. However, the subsequent UN human rights treaties in which human rights are codified in binding form were very widely ratified by states so that the core human rights have indeed become universally accepted.

11.2 Participants in the International Legal System

(Economic) globalization is the trend towards a single worldwide system of production and consumption disregarding national frontiers. Globalization is driven, on the one hand, by technological innovation (resulting in a dramatic reduction of the costs of moving goods, people, capital, and information across the globe) and, on the other hand, by policy decisions to reduce barriers to international economic transfers. Globalization is therefore both an autonomous process driven by technological progress and a political process driven by policy preferences of states. It could be slowed down if political preferences change, but it cannot be halted indefinitely because technological progress is bound to continue.

Globalization has a major impact both on the status of the participants in the international legal system and consequently on the contents of international law. It boosts the power and influence of nonstate actors at the expense of the state, the entity that has traditionally monopolized international law. Here are a few examples:

- *International organizations* benefit from globalization because states increasingly transfer competences to international institutions in response to problems that can only be adequately addressed at a global level (e.g., international trade, crime, and civil aviation).
- *Multinational enterprises* benefit from globalization because the liberalization of international trade and foreign direct investment enables them to conduct their activities and serve markets wherever this is most profitable.
- *Nongovernmental organizations* benefit from globalization because the Internet and social media help to undermine the traditional governmental monopoly of information. At the same time, these media make it easier to mobilize people and campaign against governmental abuses.
- *Individuals*—at least the lucky ones—benefit from globalization because traveling and studying abroad have become much easier and cheaper. As a matter of fact, individuals who are less well-off—such as peasants who are forced to compete on world markets—may be confronted with the negative consequences of globalization.

11.2.1 States

11.2.1.1 Expanding Circle of States

Although international law goes back thousands of years, the current system of international law is usually traced back to the peace of Westphalia (1648). The Westphalian peace treaties marked the end to the Eighty Years' War between Spain and the Netherlands and the Thirty Years' War in the Holy Roman Empire. They signaled the replacement of the long-standing power of the Pope and the Emperor by the sovereign power of independent nation-states. Sovereignty meant that states were henceforth the highest authority both internally (within their own territories)

and externally (towards the outside world). They no longer had to respect the authority of the Pope and the Emperor above themselves.

In true Eurocentric spirit, the states that emerged from the Westphalian peace treaties referred to each other as "Christian" states. This indicated that international law was only binding between themselves. In their colonies, they could behave as they pleased towards the indigenous population without—in any way—being restricted by the rules of international law. Slavery, for example, could be lawfully practiced outside the circle of Western states.

When in the nineteenth century Turkey and Japan were considered suitable to join the club, the label of the states to which international law applied was changed to the "civilized" states. In the uncivilized rest of the world, international law remained inapplicable.

In 1945, at the end of World War II, the label was changed once again. The Charter of the United Nations provided that states had to be "peace loving" in order to be admitted as a member of the United Nations. All states that met this—admittedly rather subjective—standard were considered fit to be admitted to the United Nations. Since no state was ever expelled from the United Nations for no longer being peace loving, it implied that international law was henceforth considered applicable to all states without exception.

11.2.1.2 Sovereignty

Ever since 1648, states have been the world's dominant legal entities. The number of states continued to increase as colonies became independent and states split up into new states (such as the former Soviet Union and the former Socialist Republic of Yugoslavia).

Statehood When is an entity entitled to call itself a state? This is an important question because statehood entails important legal consequences. A state is entitled to conclude treaties with other states, it can become a member of international organizations, and its sovereignty must be respected. But statehood also entails duties. A state must refrain from settling international disputes by force, and it must respect the human rights of persons within its jurisdiction.

There are three generally recognized criteria for statehood: a defined territory, a permanent population, and a government exercising effective power. Recognition by other states is not a separate requirement for statehood. A state that fails to be recognized by other states is still a state.

> Palestine, Kosovo and South Sudan are among the world's newest – although in the case of Palestine and Kosovo still contested – states.

Sovereign Equality The most fundamental principle of international law is the sovereign equality of states. An expression of that sovereign equality is that all states have one vote at the General Assembly of the United Nations, whether they are a superpower or a ministate with a few thousand inhabitants, such as the Pacific island states Nauru and Tuvalu. But there are some exceptions to this general rule,

such as the veto power enjoyed by the permanent members of the UN Security Council, as discussed below.

Nonstate actors derive whatever international legal status they have from states. States decide which rights and duties nonstate actors have under international law. This demonstrates that states are still the leading participants in the international legal system in spite of the increasing importance of nonstate actors.

11.2.2 International Organizations

The term "international organizations" refers to intergovernmental organizations (IGOs), i.e. organizations with states as members. This distinguishes them from nongovernmental organizations, organizations of which individuals are members. IGOs may have a worldwide or a regional membership.

> IGOs with a regional membership are the European Union, and the Organisation of African Unity. IGOs with a (potentially) worldwide membership are the United Nations, the World Trade Organisation (WTO), and the World Health Organization (WHO).

11.2.2.1 Powers of International Organizations

Attribution of Powers In order to safeguard the sovereign rights of their members, the competences of IGOs are based on the principle of attribution of powers. This means that they can only exercise the powers explicitly granted to them in the founding charter of the organization. This principle may cause difficulties, however, if an IGO is faced with the need to exercise powers that were not foreseen when the organization was established. Of course, the organization's founding charter can always be amended, but this requires the unanimous agreement of the member states, which is not always easy to achieve.

> Even a relatively homogeneous regional organization such as the European Union has found it difficult to muster at all times the unanimity required for repeated amendments of the EU Treaty.

Implied Powers A way out of this difficulty has been provided by the International Court of Justice. In response to a request for advisory opinion from the UN General Assembly (in the Reparation for Injuries Case), the Court observed that IGOs enjoy implied powers, which means that they may exercise the powers that are necessary to achieve the organization's objectives even when these powers have not been specifically spelled out in the organization's founding charter. This means that as long as an action is necessary to achieve the organization's objectives, it may be carried out.

11.2.2.2 IGOs and International Law

As more and more responsibilities are transferred from states to international organizations, the question may arise whether these organizations are bound by international law in the same way as states.

> Is the World Bank required to respect treaties on international environmental protection when providing a loan for the construction of a dam in a rainforest? Are the United Nations bound by treaties on the law of armed conflicts (international humanitarian law) when carrying out peacekeeping activities under their command?

IGOs and Treaties Since treaties are the main source of international law, the question whether IGOs are bound by international law depends to a large extent on whether IGOs can become parties to treaties. Generally speaking, only states and not international organizations can become parties to treaties. This is because states are reluctant to treat international organizations on an equal footing with themselves. There are however an increasing number of exceptions to this general rule. More and more treaties provide that not only states but also the European Union as a whole can become a party.

> For example, in the not too distant future the EU is expected to become a party to the European Convention on Human Rights. This would mean that EU decisions will fall under the scrutiny of the European Court of Human Rights in Strasbourg; it will be able to check whether they are in conformity with the European Convention on Human Rights.

The 1949 Geneva conventions on international humanitarian law are still not accessible to international organizations. Some years ago, the UN Secretary-General therefore issued a formal unilateral declaration according to which troops acting under UN command would henceforth be bound by the principles of international humanitarian law.

11.2.3 The United Nations

Among the international organizations that have been created by national states, the United Nations is the most prominent and important. The UN was formed in 1945 first and foremost to prevent the outbreak of another world war. The UN Charter was originally signed by 51 states. It created one main body, the General Assembly, three councils: the Security Council, the Trusteeship Council, a the Economic and Social Council, and the UN Secretariat and the International Court of Justice. The UN Charter also allows the UN authority to create additional committees, agencies, and other subsidiary organs to carry out its mission.

11.2.3.1 General Assembly

Membership The United Nations General Assembly (GA) is formed of representatives of the member states. There are currently 193 states in the General Assembly; the latest state to gain membership in the UN was South Sudan in 2011.

Observers A state may also be granted observer status by the General Assembly. An observer state can attend meetings and make statements but has no voting rights. The two current observer states are the Holy See (Vatican City) and Palestine. Numerous IGOs, such as the International Committee for the Red Cross (ICRC), INTERPOL, and UNESCO, have observer status. Regional organizations such as the EU and the African Union also are observers.

A state may apply for full membership and voting rights to the UN. The Security Council must recommend a state's admission to the UN. As with Palestine, a veto by one or more permanent members of the Security Council has been a political barrier to membership.

As noted above, in the General Assembly, each member has one vote regardless of its size, population, or economic power. It is important to distinguish the UN from a state: the UN does not have a legislature that passes laws that are binding on the member states. The resolutions issued by the General Assembly are only nonbinding recommendations. The General Assembly can also adopt treaties, but these must first be ratified by states before they become binding.

11.2.3.2 Committees and Specialized Agencies

The General Assembly has established several committees as fora for discussion and to provide reports and studies on a wide variety of topics. Most UN committee reports are available at the UN website, www.un.org, in one of the six official languages of the UN: Arabic, Chinese, English, French, Russian, and Spanish.

Operating under the auspices of the United Nations also is a large network of so-called specialized agencies, some of which are in fact older than the UN itself. They include the International Labour Organization (ILO); the World Health Organization (WHO); the Food and Agricultural Organization (FAO); the United Nations Educational, Scientific and Cultural Organization (UNESCO); the International Monetary Fund (IMF); the World Bank; the World Intellectual Property Organization (WIPO); and the World Meteorological Organization (WMO).

11.2.3.3 The Security Council

According to the UN Charter, the UN Security Council's main purposes are to

- investigate any dispute or situation that might lead to international friction,
- recommend methods of adjusting such disputes or the terms of settlement,
- formulate plans for the establishment of a system to regulate armaments,
- determine the existence of a threat to the peace or an act of aggression and recommend what action should be taken,
- call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression,
- take military action against an aggressor.

Authority for the UN Security Council to accomplish these tasks is found under Chapter VI (Pacific settlement of disputes) and Chapter VII (Action with respect to

threats to the peace, breaches of the peace, and acts of aggression) of the UN Charter.

Economic sanctions available to the Security Council include the suspension of trade, the embargo of goods, boycotts, and the so-called smart sanction of the freezing of individual financial assets, as used in the *Kadi* case mentioned above. Military action can take the form of naval blockade, aerial bombardment, or full-scale military operations as in the first Iraq war and most recently in Libya.

The Security Council has 15 members. Five states, China, France, Russia, the United Kingdom, and the United States, are permanent members, and each permanent member enjoys veto power against the adoption of a Security Council decision. The other ten Security Council members do not have veto power; they are elected periodically by the General Assembly.

Security Council Resolutions are binding upon the UN member states, and those states must obey those decisions. The UN Security Council can enforce its decisions by imposing sanctions against states that refuse to comply.

11.2.3.4 International Court of Justice

The International Court of Justice is seated in The Hague to settle disputes in accordance with international law. The Court can only settle legal disputes between states; it is not empowered to decide disputes involving nonstate actors. Unlike domestic courts, the Court does not have automatic jurisdiction. It can only settle a dispute if the states concerned have decided to accept the Court's jurisdiction. States can also withdraw from the Court's jurisdiction, for example if they object to the Court's rulings.

> The United States withdrew its recognition of the jurisdiction of the International Court of Justice after the Court had found that the United States had violated the prohibition of the use of force against Nicaragua. France withdrew its recognition of the Court's jurisdiction when it disapproved of the Court's exercising jurisdiction in a case concerning French nuclear tests in the Pacific.

11.2.3.5 UN Secretariat and Secretary-General

The UN Secretariat's main purpose is the administration of the UN and its employees, including the internal affairs of the UN headquarters in New York and other offices worldwide such as in Geneva and Nairobi and the affairs of the various departments, subsidiary organs, and agencies.

The Secretary-General heads the Secretariat and is the chief administrator of the UN. Candidates for the post of Secretary-General are nominated by the Security Council and appointed by the General Assembly for no more than two 5-year terms.

Secretaries-General have been drawn from a wide variety of states, notably not from countries that are permanent members of the Security Council: Trygve Lie (Norway), Dag Hammarskjöld (Sweden), U Thant (Burma), Kurt Waldheim (Austria), Javier Pérez de Cuéllar (Peru), Boutros Boutros-Ghali (Egypt), Kofi A. Annan (Ghana), and the current Secretary-General, Ban Ki-moon, of the Republic of Korea.

In addition to the administrative duties, various political functions have been accorded to the Secretary-General over the years. UN Charter Article 99 provides:

> The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Because of this discretionary power, the post of Secretary-General carries with it a great deal of symbolic influence on states. It depends on the occupant whether this influence is used.

11.2.4 Multinational Enterprises

A multinational enterprise is a company that has its headquarters in one state and its production or distribution facilities in one or more other states. The resulting octopus-like structure enables multinational enterprises to take full advantage of globalization. They can invest and set up subsidiaries where this is most advantageous, i.e. where the conditions with respect to taxation, labor costs, and environmental protection are least onerous.

Race to the Bottom States are keen to attract investment from multinational enterprises because this creates jobs, encourages transfer of technology, and generates income from taxation. Governments therefore tend to compete with each other by lowering their standards at the expense of their population and the environment. This process is called the "race to the bottom."

Since there are no international minimum standards regulating the conduct of companies, the race to the bottom can go on indefinitely. Proposals to create international minimum standards for companies have been discussed at the United Nations for quite some time, but they have encountered little support from states and from companies themselves. Although one might assume that "good" companies have an interest in the creation of a level playing field that obliges their competitors to behave properly, this does not turn out to be the case. Some cynics believe that international regulation of corporate conduct will only come about after another major accident that demonstrates the dangers of the current free-for-all system. Until that happens, multinational enterprises are bound merely by the individual domestic legal systems in which they operate.

11.2.5 Nongovernmental Organizations

There is no authoritative definition of a nongovernmental organization (NGO). Typically, an NGO is defined negatively by what it is not: not a government, not a political party, not an opposition movement. It usually consists of a group of individuals who aim to achieve certain idealistic objectives: protection of human rights or the environment, abolition of cluster bombs, etc.

One of the oldest NGOs is the Anti-Slavery Society established in the nineteenth century to campaign for the abolition of slavery.

NGOs have no rights or duties under international law. They enjoy legal status only under domestic law.

For example, the Netherlands branch of Amnesty International is an association established under Dutch law.

Consultative Status IGOs may however decide to grant certain NGOs so-called consultative status. Consultative status enables an NGO to attend meetings, circulate documents, make speeches, and lobby delegates. But NGOs with consultative status have no right to vote, and they may be deprived of their status at any time if the majority of the member states find that they have abused it, for example by publicly criticizing states. This illustrates how NGOs remain dependent on states for their formal international status.

Even without formal international status, however, NGOs may have significant impact on international decision making. This is because of their expertise and the fact that they represent important strands of public opinion.

The Ottawa Convention banning landmines would never have been adopted in 1997 without the forceful and sustained campaigning by a worldwide coalition of NGOs. The Rome Statute of the International Criminal Court would not have been adopted in 1998 without very effective campaigning by hundreds of NGOs around the world.

Some states have become so concerned about the perceived influence of NGOs at the international level that they have proposed the adoption of international minimum standards for NGO conduct. No such standards have been adopted so far, however. Because the power and influence of NGOs is much more limited than that of multinational enterprises, the need for the establishment of international minimum standards is less obvious for NGOs than for multinationals.

11.2.6 Individuals

A century ago, individuals had no rights whatsoever under international law. This meant that governments were free to treat them as they pleased. If a government saw fit to discriminate or even to exterminate a group of its population, no other state could object since there were no international standards prohibiting discrimination or genocide.

This is what happened, for example, during the Armenian genocide in the Ottoman Empire (Turkey) from 1915–1917. Ambassadors from Western countries were fully aware of the massacres that were taking place but they had to turn a blind eye for fear of interfering in the Empire's (Turkey's) internal affairs.

A turning point in this respect was the adoption of the Universal Declaration of Human Rights by the UN General Assembly in 1948. The Universal Declaration was itself a nonbinding instrument, but human rights have subsequently been codified in a large number of binding international treaties.

More on human rights treaties in Chap. 12.

States that are parties to these treaties are required to guarantee the rights contained in them to all persons within their jurisdiction. Individuals who consider that their rights have been violated may sometimes—after exhaustion of legal remedies before domestic courts—complain to international human rights courts or similar international bodies. A state that is violating human rights is acting contrary to its international obligations, whatever its domestic laws or its domestic courts may say.

Even in North Korea or in Somalia, international law gives individuals rights that must be respected by the authorities.

Duties Under International Law It is often forgotten that individuals not only have rights but also have duties under international law, namely the duty not to commit international crimes, such as genocide, war crimes, and crimes against humanity. These crimes are defined in the Statute of the International Criminal Court and also in ad hoc international criminal tribunals dealing with international crimes committed during armed conflicts in countries such as Yugoslavia, Rwanda, and Sierra Leone. Although only a small percentage of international crimes committed in the world are tried by these international courts and tribunals, their symbolic significance should not be underestimated. This further demonstrates the growing status of the individual in international law.

11.3 Sources of International Law

International law still has some of the traits of a primitive legal system, and this is reflected in the doctrine about the sources of international law. While customary law has lost most of its importance in modern national legal systems and has given way to statutory law, in international law it still plays an important role.

Examples of rules of customary law are the prohibitions of aggression, genocide and discrimination.

Article 38 of the Statute of the International Court of Justice mentions four sources of international law:

Art. 38 Statute of the International Court of Justice
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

11.3.1 Treaties

Of these four sources, "international conventions," also known as "treaties," and international custom (or customary law) are the most important ones. The central role of treaties follows from a basic principle of traditional international law, namely that a state is bound only by the rules of international law to which it has specifically consented.

Voluntarism This principle reflects voluntarism, the idea that a state can only be bound by an obligation after it has given its consent. Voluntarism follows from the basic rule of state sovereignty. Since states represent the highest authority in the international legal system, they are not required to accept any obligations they don't agree with. A state may express its consent, for example, by becoming a party to a treaty in which the obligation in question is included.

> The way in which treaties can be concluded is regulated by the *1969 Vienna Convention on the Law of Treaties*.

A state therefore is entirely free to join or not to join international legal instruments such as the UN Convention against Climate Change. A state may feel politically pressured to join, but it is under no legal obligation to do so.

11.3.2 Ius Cogens

Peremptory Norms The traditional voluntaristic approach is being undermined by the emergence of *ius cogens* or peremptory norms of international law. Rules of *ius cogens* or peremptory norms are the highest in rank, and they override any contrary international obligations of a state. Examples of rules of *ius cogens* are the prohibition of genocide and the prohibition of aggression. Article 53 of the *1969 Vienna Convention on the Law of Treaties* provides the following description:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It follows that a treaty in which two states agree to commit aggression against another state is null and void because it is incompatible with the rule of *ius cogens* prohibiting such conduct.

Such a hierarchical structure of norms makes international law more comparable to domestic legal systems in which laws override regulations and constitutional provisions override ordinary laws.

11.4 Jurisdiction

"Jurisdiction" refers to a state's competence to make and enforce rules in respect of persons, property, or events. Such competence may be exercised in three ways: by way of legislation (by the legislature), adjudication (by the courts), or enforcement (by the police or the military). The law of jurisdiction is an important chapter of international law because it is obvious that conflicts may arise if different states exercise competing jurisdiction over the same persons, property, or events.

> Is the European Commission entitled to impose a hefty fine on Microsoft (a US company) for its monopolistic practices worldwide? Is the United States entitled to take sanctions against non-US companies that conduct business in Cuba? Are the Netherlands entitled to prosecute a Rwandan national for her participation in the 1994 genocide?

The traditional starting point for answering such questions is that states exercise exclusive jurisdiction on their own territories. This means that there is a traditional presumption against the exercise of so-called extraterritorial jurisdiction. However, as a result of globalization (including foreign travel and migration, international trade and investment, military enforcement action, environmental degradation, transnational crime and terrorism, and legal and illegal uses of the Internet), states increasingly perceive the need to protect their own interests and the interests of the international community in respect of conduct beyond their borders.

Extraterritorial enforcement action (such as an arrest or a drone strike in a foreign country) is still strictly prohibited by international law unless specifically consented to by the territorial state. But legislation and adjudication in respect of extraterritorial persons or events are increasingly being permitted or even required by international law. This development is driven by idea that such exercise of jurisdiction is allowed if there is a sufficient connection between the state exercising jurisdiction and the person or the event. Whether in a particular situation there is a sufficient connection tends to be determined with reference to several jurisdiction principles:

1. The *active nationality principle* refers to the jurisdiction a state may exercise over persons (including legal persons) that have its nationality. This principle is well established.
2. The *passive nationality principle* refers to the jurisdiction a state may exercise over conduct abroad that injures its nationals. This principle is more controversial, but it is increasingly being included in multilateral treaties aimed at combating terrorism and international crime.
3. The *protective principle* refers to the jurisdiction a state may exercise over persons who threaten its vital interests by preparing a coup d'état, carrying out acts of terrorism, counterfeiting currency, or conducting other activities against national security. This principle is not uncontroversial because it is uncertain precisely which offenses are covered by it.
4. The *universality principle* refers to the jurisdiction a state may or must exercise over certain serious crimes, irrespective of the location of the crime and

irrespective of the nationality of the perpetrator or the victim. Unlike the protective principle, the interests protected by the universality principle are those of the international community as a whole. International crimes subject to universal jurisdiction include piracy, war crimes, terrorism, and torture. Although the principle is included in an increasing number of multilateral treaties, its implementation in practice may give rise to controversy because states may object to their nationals—especially their (former) officials—being tried in foreign countries for offenses committed elsewhere.

5. The *effects principle* refers to the (civil) jurisdiction a state may exercise when foreign conduct produces substantial effects on its territory. Unlike the other jurisdiction principles, this one tends to be relied upon in commercial rather than in criminal cases. The principle originates from US case law but is increasingly accepted also in other countries as a basis for exercising jurisdiction.

11.5 Characteristics of International Law

How does international law compare to domestic law? Perhaps the overarching difference is that the international legal system is less developed than the average domestic legal system. Accordingly, international law has a limited, although continuously increasing, rule density. This means that many matters are still unregulated and therefore left to the discretion of states. This happens of course because states are reluctant to give up their freedom of action. The limited development of international law is also reflected in its institutional framework and its enforcement system.

11.5.1 Institutional Framework

The international legal system still lacks the institutions that are familiar in domestic and regional (European) laws, such as a centralized legislator, a centralized judiciary, and a centralized enforcement system. International institutions, which at first sight seem to play this role in the international legal system, on closer inspection turn out to have a much more limited function. As noted above, the United Nations General Assembly does not have the power to adopt global legislation. It can only adopt nonbinding recommendations. Also, as noted above, the International Court of Justice does not have automatic jurisdiction over disputes between states.

International courts and tribunals exist, but they have no hierarchical relationship to each other. Judgments of the Court of Justice of the European Union, the highest judicial organ of the European Union, cannot be appealed before the International Court of Justice, the principal judicial organ of the United Nations. A person convicted by the Yugoslavia Tribunal cannot appeal to the International Criminal Court. This creates a certain risk of diverging case law, although in practice there are not many examples of conflicting jurisprudence.

11.5.2 Enforcement

For its enforcement, international law is still dependent on states and on domestic institutions. There is no standing UN police force to enforce compliance with the rules of international law. The International Court of Justice relies on the willingness of states to comply with its judgments. The UN Security Council may authorize the use of force against an aggressor state, but the implementation of such a decision is dependent on a "coalition of the willing," i.e. a group of states willing to make their armed forces available for this purpose.

The International Criminal Court may issue arrest warrants against anyone suspected of having committed international crimes, even against heads of states. This sounds impressive but for the capture of a head of state the Court relies on domestic institutions able and willing to carry out the arrest.

> For example, in 2009 the Court issued an arrest warrant against Sudan's President Omar Hassan al-Bashir, but he has so far managed to travel to several African countries without being arrested.

11.6 Trends in the Development of International Law

The emergence of nonstate actors, in particular individuals, as participants in the international legal system is having a major impact on the content of international law. It undermines the traditional interstate nature of international law, which is aimed exclusively at the protection of the interests of states. This is reflected in the rise of international *ius cogens*, as described in Sect. 11.3.2. In the following, there are some further examples of major developments in international law.

11.6.1 From Prohibition of Interference in Internal Affairs to Responsibility to Protect

Traditional international law primarily contains negative rules, i.e. standards that impose on states an obligation to refrain from taking certain actions. One example is the prohibition of interference in internal affairs reflected in Article 2 (7) of the UN Charter:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.

The prohibition of interference in internal affairs or matters within domestic jurisdiction is a crucial element of traditional international law because it helps to protect state sovereignty against outside intervention by other states. Accordingly, under traditional international law, it is an internal affair for a government to destroy its environment or massacre its own population. No other government is permitted to intervene or even to express concern.

However, this situation changes when international standards are created according to which states have a duty to respect and protect their natural environment and the human rights of their inhabitants. Any violations of these obligations are then no longer an internal matter of the state in question since these obligations are owed to the other states that are parties to the same convention or that are bound by the same rule of customary international law. Those other states are permitted to insist on compliance with those standards, and they may take legal proceedings against the violating state or even apply sanctions against it to force it to comply with its obligations. What amounts to an internal affair or a matter of domestic jurisdiction is therefore subject to continuous change. In fact, the scope of the notion "internal affair" is continually shrinking.

Under traditional international law, "third" states are entitled but not obliged to take remedial measures against a violating state. Often, third states will have good political reasons to simply look the other way. No government enjoys being told by another government what it should do. The natural tendency is not to criticize the behavior of other states because it increases the risk that it may itself be at the receiving end of such criticisms in the future.

Responsibility to Protect According to more recent developments in international law, however, states actually have a duty to respond, at least to serious breaches of international law. They have a responsibility to protect people against international crimes (genocide, war crimes, crimes against humanity, and ethnic cleansing). The "responsibility to protect" principle was formally adopted by the United Nations General Assembly in 2005. The principle entails that states have a responsibility to protect the human rights of their own inhabitants, but if a state fails to comply with this responsibility the international community has a responsibility to act. Although the principle was included in a nonbinding resolution, it has since been referred to in several Security Council Resolutions that are binding on states, most recently in Security Council Resolutions imposing sanctions on, and authorizing the use of force against, the regime of Colonel Gaddafi. This obviously is a long way from the prohibition of interference in internal affairs that pertained in the past.

11.6.2 From Immunity to Universal Jurisdiction

Under traditional international law, the highest representatives of a state (the head of state, the head of government, and the foreign minister) enjoy immunity from criminal prosecution before foreign courts. This means that they may not be prosecuted there for any criminal offense they may have committed. The underlying reason for this principle is that bringing these high representatives of the state to trial before foreign courts would be incompatible with the sovereign equality of states. Since all states are equal, the persons personifying them should not be subjected to the jurisdiction of other states. Moreover, if these high officials could be arrested any time they are traveling abroad, this would undermine the freedom of

interstate relations. As a matter of fact, international law does not prohibit—and may even require—the prosecution of these officials in their *own* countries.

More recently, however, states have been adopting treaties that oblige states to prosecute and try certain very serious crimes, such as genocide, war crimes, crimes against humanity, and torture irrespective of where or by whom they were committed. These treaties, which have been widely ratified, do not make an exception for high government officials. There is therefore a contradiction between the traditional immunity rules and these so-called universal jurisdiction provisions in respect of international crimes. The dilemma sharply arose in the Arrest Warrant Case before the International Court of Justice.

> In 2000, a Belgian investigative judge issued an international arrest warrant against Abdoulaye Yerodia Ndombasi, the Foreign Minister of the Democratic Republic of Congo. He was accused of having made a speech inciting genocide against the Tutsi ethnic group. Congo responded by filing an application against Belgium at the International Court of Justice, claiming that its Foreign Minister enjoyed immunity from Belgian jurisdiction. In 2002, the case was decided in Congo's favor. The Court found that as a Foreign Minster Mr. Yerodia enjoyed full immunity and could not be prosecuted in Belgium even for international crimes.
>
> The judgment was criticized for failing to properly balance the traditional state interest of immunity for high state officials versus the emerging interest of the victims of international crimes to combat impunity for the perpetrators of international crimes. The criticism was aimed in particular at an observation by the Court according to which high state officials continue to enjoy immunity even after they have retired from office as long as the crimes of which they are accused have been committed in an official capacity.

The dilemma may be solved for the time being by assuming that high officeholders cannot be prosecuted abroad, even for international crimes, as long as they are in office. But as soon as they are no longer in office, such prosecutions would be possible even for crimes committed in function. In this way, a compromise would be found between two contradictory interests: traditional respect for other states' sovereignty and the emerging wish to bring an end to the impunity of the perpetrators of the most serious crimes.

International criminal courts and tribunals do not face this problem of immunity of high officeholders. Their statutes always specifically provide that they can try anyone irrespective of their official rank.

> Accordingly, the Yugoslavia Tribunal has tried former President Slobodan Milošević (but he died before the trial was concluded). Quite recently the Sierra Leone Tribunal has found Charles Taylor, the former President of Liberia, guilty of war crimes and crimes against humanity.

11.6.3 From Nationality as a Favor to a Right to Citizenship

Another illustration of the traditionally inferior status of the individual vis-à-vis the state in international law is the law relating to nationality. Under traditional international law, a state is entirely free to decide by which criteria and on which

individuals it will confer its nationality. It should just make sure not to interfere with the rights of other states. This follows again from the fact that states are sovereign.

One result of this approach is that currently there are some 12 million stateless persons in the world. Such persons experience great difficulty in traveling, and if their human rights are violated no state will act on their behalf.

Article 15 of the Universal Declaration of Human Rights provides that "Everyone is entitled to a nationality," but this provision is difficult to enforce because the Declaration is not binding on states. No similar provision has been included in UN human rights treaties that have been concluded subsequently. There are some treaties that attempt to reduce the number of stateless persons, but these have had limited impact. However, as the status of the individual in international law continues to strengthen, it may be expected that nationality will gradually change from a favor that may be granted or not be granted by states into a right that can be enforced under international law.

Conclusion

International law is a highly dynamic branch of law. Its content is changing rapidly as a result of globalization and the growing influence of nonstate actors. The emergence of these nonstate actors on the global scene is having an increasing impact on the procedural and substantive rules of international law because they insist that their interests and their aspirations are reflected. As a result, international law is gradually being transformed from interstate law into the law of the world community. International law now covers practically all topics that are traditionally covered only by domestic law, and it is therefore extremely wide-ranging. The study of international law is interesting, also for the nonspecialist, because the comparatively undeveloped nature of the international legal system stimulates reflection on fundamental aspects of the law. Although the international legal system traditionally consists of unrelated rules and institutions, there are some modest indications of an emerging international constitutional order.

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Human Rights

12

Gustavo Arosemena

12.1 Introduction

From Rules to Rights One natural way to look at the law is to see it as a collection of rules laid down by a competent authority that tell us in more or less concrete terms what we should do, what is required, prohibited and permitted. This view of the law has been the dominant one for many centuries, and probably still is. Relatively recently, however, another way of looking at the law has been gaining in popularity. This view does not focus on the specific rules that have been laid down to guide our behavior but rather on the interests of the human beings that the law should aim to protect. This view, requiring more than just compliance with the rules, requires that the rules have a certain content, that they should aim at the pursuance of the interests of human beings, that they should be interpreted in a way that furthers these interests, and that rules that definitively run counter to human interests should be discarded. One such way of thinking is couched in the term *human rights*.

This change in emphasis has had a great impact on legal reasoning because human rights are often not very specific about which kind of behavior they require. Take for instance Article 3 of the Universal Declaration of Human Rights, which reads: "Everyone has the right to life, liberty and security of person." On its own, this text leaves much to be said for one who must determine what this human right implies in practice. Many human rights are protected by means of international treaties, and the judicial interpretation of these treaties has created a body of case law that gives the abstract proclamations of human rights hands and feet. However, this does not change the fact that human rights law is not primarily based on explicit rules that guide individual conduct but on interests that should shape the law and orient human and institutional behavior.

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Provisional Definition As a provisional starting point, human rights may, in a more or less orthodox fashion, be defined as

– rights
– that every person has
– by virtue of merely existing and
– that aim to secure for such a person certain benefits that are of fundamental importance to any human being.

Overview How did these human rights come about? Are they merely the product of human rights treaties of the twentieth and twenty-first centuries, or have they been recognized over a longer period of time? The historical introduction to human rights in Sect. 12.2 puts the idea of human rights into perspective. Afterwards Sect. 12.3, explains the functions that human rights fulfill in law and in the wider political culture by distinguishing four different dimensions of human rights.

As rights, human rights conceptually require that there is a right holder, and one of the first questions in connection with human rights is who these *rights holders* are, as the concept "human being" involves certain complications and can be understood by law in ways that are not always intuitive. This question will be addressed in Sect. 12.4.

Likewise rights impose duties on some other party who must respect and honor the rights. Which institutions and persons owe these duties? Who are the *duty bearers*? This question is the topic of Sect. 12.5.1. The "vagueness" of the human rights discourse in comparison to the usually more specific nature of behavior-guiding rules will receive more attention here.

Rights are naturally rights to something. Section 12.6 deals with the issue of what are the benefits or interests that human rights advance and protect. It describes the *object* of human rights.

Human rights protect interests such as human life, absence of slavery, freedom of movement, provision of health care and so on. Sometimes these interests conflict with each other or with other social goals. This raises the question of the boundaries of human rights. Do human rights always have the last word, or can they be displaced by other considerations? This is the topic of Sect. 12.7.

One thing that makes human rights different from what are merely interests of human beings is that they are protected by law. The nature of this protection will be discussed in Sect. 12.8.

The chapter will be concluded in Sect. 12.9.

12.2 The Historical Development of the Idea of Human Rights

We are all familiar with the idea of human rights. Upon hearing the phrase, statements such as "Everyone has the right to freedom of speech" and "Nobody should be discriminated against because of his race" spring to mind. Despite their familiarity, these statements are the tip of the iceberg of a complex phenomenon

that has developed through history and that has, these days, many different institutional manifestations.

12.2.1 Roots

Natural Law Background Historically, human rights can trace their origin to the natural law tradition developed, among others, by the Stoics of Ancient Greece and Rome and philosophers such as Francisco de Vitoria (1483–1546) and Thomas Aquinas (1225–1274). According to the natural law tradition, above positive law there was a higher law, that applied to all mankind and to which positive law should conform.

More on natural law in Sect. 14.5.

At the time of the Enlightenment, intellectuals such as John Locke (1632–1704) and Thomas Paine (1737–1809) interpreted natural law principally as a set of rights, making the similarity with modern human rights discourse very apparent. This tradition influenced various political declarations (as opposed to legally binding documents), some of which have acquired legal status with time. A prominent example is the French Declaration of the Rights of Man and of the Citizen of 1789. The first indisputably *legal* fruit of this tradition, however, was the *Bill of Rights* of the Constitution of the United States ratified in 1791.

12.2.2 Decline Under the Influence of a "Scientific" World View

On the ideological front, the natural law world view lost influence in the nineteenth and early twentieth centuries. In an era dominated by scientific revolutions, natural law (and natural rights by implication) seemed to rest on unjustifiable metaphysical assumptions. After all, natural rights are not things whose existence can be verified by scientific means, and what the sciences do tell us is that ideas of what is right and wrong vary across cultures and historical eras. In contrast, rising trends that were opposed to natural law and natural rights, such as legal positivism, codification, utilitarianism, and Marxism, all claimed to represent tough-minded, scientific points of view.

There is a line of thinking that extends from this era onwards, which views human rights with suspicion, for instance, as impositions of western European culture on equally justified traditional values or as fictions made by the privileged few to constrain the demands of the many.

Situations that animate this suspicion can be found easily enough. For instance, there is the so-called *Lochner Era* of the United States Supreme Court, which takes its name from the *Lochner v. New York* case (1902). During this period the Supreme Court, under the pretense of protecting constitutional rights, invalidated progressive legislation that aimed at limiting the working hours of laborers and at establishing minimum wages.

12.2.3 Revival After the Second World War

The natural rights movement and its essentially cosmopolitan orientation experienced a revival after the horrors of the Second World War. Prior to the war,

Germany represented in many ways a democratic, nationalistic, and scientific paragon. The presence of these attributes was not enough to contain its lapse into totalitarianism. According to some accounts, they were even enabling or contributing factors.

Internationalization Until the aftermath of the Second World War, the legal protection of human rights was seen exclusively as a domestic affair. The reason for this was the development of the state system that was based on the idea of sovereignty. If all states are equal and are the ultimate authority in their own internal affairs, there is a natural limit to what can be regulated by international law. International law can legitimately regulate the relations between sovereign states, but it has no say in what states do within their own borders.

On sovereignty see the Sects. 8.1.2 and 11.2.1.2.

The Second World War changed this. It shook the conscience of mankind, making human dignity a universal concern. Furthermore, it linked human rights to peace, as totalitarianism at home spilled over into global war. With this precedent, the first global human rights declaration was made, the 1948 *United Nations Universal Declaration of Human Rights* (UDHR).

According to the political scientist Andrew Moravcsik (1958-) the creation of international human rights instruments was an attempt to "lock-in" democracy with a view to ensuring peace. He argues that knowing that violations of human rights often signal a lapse into totalitarianism, and that totalitarianism often flares into war, states chose to surrender some of their power to an international institution in order to guarantee liberal democracy.

12.2.4 Human Rights Treaties

After 1948, human rights protection systems proliferated, both domestically and internationally. At the United Nations level, the "nonbinding" UDHR was followed by various international human rights treaties, the most general being the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), both of which were opened for signature on 1966 and entered into force in 1976.

At the regional level, three significant regional systems of human rights protection came into force:

1. the European System of Human Rights Protection, operating out of the Council of Europe and encompassing most states of geographical Europe, including Russia, Turkey, Georgia, Azerbaijan, and Armenia but excluding Belarus;
2. the Inter-American System of Human Rights, operating out of the Organisation of American States encompassing almost all states of the continent but with full participation of mostly Latin American states;
3. the African System of Human Rights Protection, originally operating out of the Organisation for African Unity and now based in the African Union, encompassing nearly all African countries.

Less mature initiatives exist in Asia and the Arab region, but their relative lack of development means that citizens of these countries need to rely more on the UN system.

12.2.5 Constitutional Human Rights

At the domestic level, the Basic Law of the Federal Republic of Germany of 1949 (eventually the constitution of the reunified German state) began a wave of right-entrenching constitutionalism across the world, with a second wave taking place after the fall of the USSR in the early 1990s.

Nowadays, most states of the Western world have constitutions that include enforceable bills of rights with more or less the same content as the ICCPR. Even traditional bastions of resistance to the idea of legally entrenched and judicially enforceable human rights, such as the United Kingdom and Canada, have been influenced by this trend. In the case of the United Kingdom, this has been done through the domestic incorporation of regional human rights standards (the Human Rights Act of 1998 incorporated the European Convention of Human Rights into domestic law), while in Canada this occurred through the development of a home-grown bill of rights (in particular, the Canadian Charter of Rights and Freedoms of 1982).

> Some scholars oppose this trend. Jurists Jeremy Waldron (1953-) and Mark Tushnet (1945-) for instance, see the increasing proliferation of rights-entrenching constitutionalism as a threat to participative democracy, replacing the voice of the people with the opinions of judges as the final word of the legal and political process.
>
> On the tensions introduced by judicial review see Sects. 8.2.7 and 8.2.8.

Terminology It must be conceded that constitutions rarely speak of human rights. Sometimes they do (as in the case of Venezuela), but normally they use a different terminology, such as "civil rights" in the United States or "fundamental rights" in Germany, the Netherlands, Italy, and Spain, and other expressions such as "constitutional rights" or "basic rights" are not unknown. The change in terminology is not necessarily cosmetic, as it may reflect a different, more local, philosophical conception of rights. Nevertheless, this does not affect that, generally speaking, constitutional rights accrue to persons by virtue of existing and therefore apply equally to foreigners. Even if domestic rights and international rights have different inspirations than treaty-based rights, they are sufficiently similar in their functions, structure, and content to warrant joint treatment.

12.3 The Uses of Human Rights

Human rights are not the monopoly of lawyers. Although the present chapter focuses on human rights as a legal phenomenon, the legal dimension of human rights does not exhaust the field, and it might not even be the dominant dimension.

In principle, one can use human rights in (at least) four different ways, only one of which is, strictly speaking, legal, namely as: (1) positive law, (2) moral standards, (3) standards for measurement, and (4) a political language.

12.3.1 Human Rights as Positive Law

Human rights are a legal reality. From this perspective, they exist after they are created by law, and to know what rights we have, we have to look at the relevant sources of law that are currently in force. Normally the place to look will be the constitution and ratified international treaties. This view cannot be the whole story. Taken to the extreme, this point of view leaves very little room for the notion that *all* human beings have the same rights, merely by virtue of existing.

12.3.2 Rights as Moral Ideals

The existence or lack of existence of rights as a legal reality does not impede their existence as a moral ideal. The latter is independent of the law and is best expressed in the often repeated point that human rights are not enacted by law but merely officially recognized.

> For instance, the preamble of the United States Declaration of Independence (1776) clearly upholds this view when it states:
>
> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights[. . .]".
>
> Likewise, the preamble of the United Nations Universal Declaration of Human Rights (1948) speaks of "recognizing inherent rights":
>
> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[. . .]".

These two dimensions—human rights as positive law and as moral ideals—need not be seen as contradictory. In a legal sense, human rights exist when they are officially incorporated in the legal system through treaties, statutes, or the constitution. Yet this remains independent of their existence as a moral ideal.

Interplay Positive Law and Moral Ideals In fact, the moral dimension of rights allows us to criticize the legal dimension. Assume, for instance, that country X is a dictatorship that does not mention human rights in its domestic legislation and that it has not ratified any human rights treaty. Even then, it still makes sense to say that the dictator of country X, who commits torture and censors the press, violates the human rights of his citizens. The legalistic reply that citizens of country X have no rights because no legal instrument has granted them rights misses the point. The right answer is that the moral rights of the citizens of X are being violated and that the state must enact laws that recognize these rights. Likewise, one could argue that

certain enacted human rights should be repealed, as they do not reflect a real fundamental moral right.

Added Value of Legal Human Rights At the same time, the legal dimension of human rights provides stability and clarity to the human rights. Disagreement is much more prevalent in morality and political ideology than in law, and it is very beneficial to agree on an official list of human rights that could be relied upon by all despite of ideological differences.

> To give an example, some ideologies make strong claims against certain human rights. In the left, the more radical forms of socialism do not recognize the right to property. On the right, radical libertarians would not recognize any right to welfare, as that would imply resource redistribution which they strongly oppose. Given that both radical socialists and radical libertarians have to live together, it makes sense to define a public and official list of legal rights that both can rely on.

Impossibility to Fully Separate the Two Dimensions The preceding discussion presents the legal and moral dimensions of human rights as analytically distinct. Nevertheless, on a deeper level, it is questionable if it is really possible to neatly separate the legal and moral dimensions of human rights. For one, the scope of legal human rights is relatively undefined, and eventually reference must be made to moral reasoning in order to give content to these rights. While it may be uncontested that we all have a right to freedom of speech or privacy, it seems doubtful that a judge may determine what constitutes speech or privacy without any reference to moral values. Furthermore, many constitutions and treaties make reference to unlisted rights. How does one find out what these rights are if not by reference to some notion of moral rights?

> An example is the 9th Amendment of the US Constitution which states:
> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Finally, the sources of international law seem to be open to moral principles. In particular, the notion of *ius cogens* makes reference to principles that are not codified through treaty law nor embodied in custom but which are to be identified through reason.

> More on *ius cogens* as a source of International Law in Sect. 11.3.2.

12.3.3 Rights as Standards

A third dimension of human rights is that of human rights as standards for measurement. Imagine we want to know how free a particular country is. Instead of coming up with an idiosyncratic measurement of freedom, it might be useful to use human rights as relatively detailed and accepted standards of what freedom requires. For this purpose, it is not important whether the country has ratified a particular treaty or not but rather that the treaty standards are sufficiently detailed

and legitimized to allow measurement. Clearly, this function is better suited to international human rights, as it may be illegitimate to judge freedom of speech in China using the United States Constitution as a frame of reference, but it might be legitimate to judge freedom of speech in both countries using UN treaties as the point of reference. One of the main benefits of the UN human rights system is the wealth of information it produces about the state of human rights across the globe.

12.3.4 Rights as a Political Language

Finally, the vocabulary of human rights also functions as a political language. Individuals, groups, and organizations that aim to reach a particular objective often adopt the rhetoric of rights. They do so not because they are convinced that they legally have that right or because they feel it illustrates a deep moral principle. Rather, they adopt the language of rights because they believe it is more effective than other forms of political posturing.

> In an appeal to the United Nations in 2002 to pressure Iraq into various political and military concessions, George W. Bush repeatedly stressed human rights:
>
> "The United Nations was born in the hope that survived a world war, the hope of a world moving toward justice, escaping old patterns of conflict and fear. [. . .] Last year, the UN commission on human rights found that Iraq continues to commit extremely grave violations of human rights and that the regime's repression is all-pervasive. The history, the logic and the facts lead to one conclusion: Saddam Hussein's regime is a grave and gathering danger. [. . .] Our partnership of nations can meet the test before us by making clear what we now expect of the Iraqi regime."
>
> Arguably, the main motive for this exercise was not humanitarian but rhetorical; the politician thought that the language of international human rights made his claims more powerful. Examples such as these can be found across the whole range of the political spectrum.

12.4 The Right Holders

In this section, two questions will be addressed: (1) in what sense only human beings can have human rights, (2) whether all human beings have (the same) human rights.

12.4.1 What Counts as Human?

Human Rights for the Unborn? If we are talking about human rights, it seems obvious that the right holder must be a human being, but such simplicity is hides pervasive disagreements. For one, there is considerable debate about when life starts and ends, a debate that has significant consequences for human rights. For example, if life starts with conception, then abortion would be prohibited by the right to life. Likewise, it is questionable at what point severely injured individuals are really dead and cease to be holders of rights.

> While most human rights instruments leave open the question of when life starts and when it ends, making it a matter for judicial interpretation, the American Convention on Human Rights is explicit on when life starts. Article 4(1) states:
> "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

Human Rights for Corporations? Beyond the medical setting, one can question whether legal persons (such as corporations) are should be deemed to count as human persons for the sake of human rights. On one hand, they do not have feelings and we do not deem them to be endowed with dignity. On the other hand, it seems that certain rights naturally express themselves through corporations and excluding corporations from protection can lead to gaps in the system. For instance, it is customarily assumed that freedom of press can be exercised by a newspaper company or that freedom of association includes the right to create legal persons.

> This particular issue has been resolved differently in different jurisdictions. The European Court of Human Rights grants protection to corporations, the Inter-American Court of Human Rights does not.

Collective Rights Another relevant problem is the rights of collectives. Human rights have been traditionally conceived as rights of individuals; they are tied historically to individualism and liberalism. Many have thought that such individualism should be tempered by adding a collective dimension to the rights that protect not only the individual person but also the subsistence of a group and its customs.

> Due to the presence of various indigenous tribes in South and Central America, the Inter-American Court of Human Rights has recognized at times that there are human rights that these tribes enjoy collectively, especially the right to collective ownership of their ancestral lands. The African Convention on Human and Peoples' Rights takes the same approach, and explicitly recognizes collective rights to development, peace and a healthy environment.

The danger of collective rights is that they may enter into conflict with individual rights, for instance when the right of a collective to enjoy its traditional forms of justice implies the endorsement of discriminatory practices or the use of punishments that are now considered inhumane.

> This is arguably a problem for some Latin American countries where indigenous tribes have gained the right to use and administer their own justice system. This system sometimes involves flogging, the death penalty and rudimentary standards of evidence, which are human rights violations under the local constitution.
>
> The same can be said of other deeply held cultural practices like female genital mutilation and forced marriages, which though "essential" to the conservation of a traditional culture, are human rights violations under the international standard.

Future Generations Finally, at a more theoretical level, one may wonder about the status of future generations. The unborn do not have a say or a vote in politics of any sort, yet they may be severely impacted by decisions taking place now, for instance concerning the conservation of the environment. This powerlessness might justify granting them rights.

12.4.2 Universality and Relativism

Universality refers to the idea that *every* human being has the same human rights because all the rights accrue by virtue of his humanity and nothing else is required. Here, it is important to unpack the moral and legal dimensions of rights, as discussed in Sect. 12.3. Morally speaking, human rights may be universal, but legally speaking this is not entirely the case. Not all countries of the world are parties to all the relevant treaties, and this means that some people have less legally recognized rights and fewer avenues for protection than others. Moreover, not all countries have bills of rights.

Cultural Relativism However, even the universality of human rights as moral ideals has been questioned. For many, the idea that a single set of rights may be adequate for all people is preposterous. They argue that human rights are a strictly Western concept and should not be imposed on regions of the world that do not share the culture, history, and values of the West, such as Asia and Africa. This is the now the widely known idea of cultural relativism.

> A key expression of this idea can be found in the "Statement on Human Rights" of the American Anthropological Association (1947), which stressed the need to study and honor the values of other cultures and warned against the making of a Universal Declaration of Human Rights that reflects only Western values. Typically, African and Asian societies are said to be community-oriented instead of individualistic in nature, and to put more emphasis on duties than rights. The "Asian Values" challenge was particularly effective by the end of the twentieth century, where various Asian countries reached significant levels of economic development. Apologists of the Asian Values doctrine suggested that Asians prefer economic development over rights, disregarding rights in favor of development-enabled economic growth.

Care should be taken not to overstate the force of the cultural relativist critique. In a certain light, it exemplifies the so-called naturalistic fallacy, which assumes that the way things are now (people hold different values) determines how things should be (they should always continue to have those diverging values). In many cases, one can value something without caring much how or where it originated from, in the way that one can value Arabic numerals even if one is not from the said geographical region. Even if it were true that human rights are a Western concept, this is no reason why people from other regions cannot benefit from them.

12.5 Duties

12.5.1 Who Are the Duty Bearers?

The general orthodoxy is that human rights only create duties for the state. This can be explained by the fact that, during much of the recent history of human rights, the power of the state has been secure, and so it has been easy to attribute all major breaches of human dignity to acts or omissions of the state.

This orthodox view has been challenged on at least two fronts. On one hand, many argue that due to globalization the state has lost much of its control on what happens in a given country. As such, it is unrealistic to hold the state accountable for violations where the primary agents are multinational corporations, international organizations, organized crime or terrorist groups. It has become necessary to target these entities directly.

On the other hand, academics and activists involved with, for instance, women's rights or the rights of children find that there are patterns of rights violation that are so subtle and pervasive that it is impossible to address them through the state mechanism without destroying private life. As an alternative, they argue for human rights education, according to which every person should see himself not only as a right holder but also as a duty bearer towards his fellow men.

Indirect Application to Nonstate Agents Legally speaking, the idea that the sole duty bearer for human rights is the state is quite secure. Nevertheless, human rights law has been applied indirectly to nonstate agents through three legal constructions. One is the duty to protect, which will be explained in the next subsection. The second is the doctrine of vicarious liability, according to which under certain circumstances the acts of certain individuals that do not officially represent the state are construed as acts of the state. The third doctrine is that of "irradiation effect," according to which normal statutes such as the Civil Code or the Criminal Code should be interpreted in light of constitutional principles, which often include human rights.

12.5.2 Types of Duties

Negative and Positive Rights Historically, there has been significant tension between "negative" or "liberty" rights and "positive" or "welfare" rights. The first refer to rights that secure for the individual a space free of state intervention, and the second refers to rights that aim to secure state intervention that guarantees a minimum level of well-being to individuals. Freedom of speech and the right to privacy are typical examples of the first set of rights, and the right to housing and the right to food are typical examples of the second.

The division between the two sets of rights is usually meant to discriminate against the positive rights on grounds that state intervention is, generally speaking, a dangerous thing, or because they are costly and cannot realistically be enforced on a universal basis.

> At the UN level, the negative rights are called "civil and political rights" and the positive rights are called "economic, social and cultural rights". The tension between these two sets of rights was a dominant theme in the drafting of the main UN global treaties for the protection of human rights. The Universal Declaration of Human Rights (UDHR) included both types and at first the idea was to make a single binding human rights treaty with the same content as the UDHR. Nevertheless, first world countries strongly resisted the inclusion of economic, social and cultural rights in a binding treaty, while socialist countries championed their primacy. As a result of this controversy, it was decided to split the rights into two covenants, resulting in the ICCPR and the ICESCR we have today.

Three Kinds of Duties Nowadays, the strict division between liberty or negative rights and welfare or positive rights has lost ground. It is increasingly recognized that a single human right may give rise to many duties; some of these duties may be negative and others positive.

> In this respect, human rights are now seen to be a lot like the right of ownership explained in Chap. 5. The right of ownership could be broken down in analysis and in practice into various smaller components; likewise, human rights can be broken down into specific duties of different sorts.

To state this in modern terminology: any right may give rise to duties (1) to respect, (2) to protect, and (3) to fulfill.

Duties to *respect* are negative and are complied with by the state by refraining from doing something: from impairing the enjoyment of a right.

Duties to *protect* require the state to take action to prevent third parties from impairing the enjoyment of a right of another individual.

Duties to *fulfill* are positive and require the state to take action (such as aiding, providing, or informing) in order to ensure that somebody enjoys a right that he is presently not enjoying.

So, for example, the traditional "negative" or "liberty right" freedom of speech gives rise to:

- a duty to respect in the sense that the state should not censor speech that criticizes the government,
- a duty to protect, in the sense that the state must protect protesters from harassment and intimidation that could discourage speech, and (maybe)
- a duty to fulfil, that the state must take steps to encourage pluralism in media.

Likewise, the traditionally "positive" or "welfare right" to education gives rise to:

- a duty to respect, that the state should not ban certain children from receiving an education,
- a duty to protect, that it should ensure that family stereotypes do not impede girls from getting an education, and
- a duty to fulfil, to make public education available for everyone.

Different Degrees of Responsibility Compliance with these different duties cannot be required in the same fashion. While it may make sense to make the state immediately liable if it fails to respect a human right, as occurs in cases of intentional killing or torture, the same thing cannot be said for the other two types of duties. The state can never guarantee that persons are absolutely protected from malevolent third parties. Failure to protect should only arise when a state does not exercise due diligence in carrying out this role.

Finally, the obligation to fulfill can only be understood as being conditioned on the material resources that the state has to carry out its role as a provider. A breach of an obligation to fulfill implies a capacity to carry out the required expenditures or a culpable failure to increase such capacity over time.

> The South African Constitution (1996) contains many prominent welfare rights. In the case Grootboom and Others v Government of the Republic of South Africa and Others (2000), the South African Constitutional Court devised an influential test to see whether the

government was complying with these rights. This is the so-called test of "reasonableness review". Under this test, the Court does not simply ask itself, are there homeless people in South Africa, or are there enough schools in South Africa? Rather the Court addresses whether the government has a reasonable plan to deal with the situation of homelessness or lack of school facilities.

12.5.3 The Focus on Rights

The focus on general abstract rights that give rise to various sorts of duties is a noteworthy feature of the human rights discourse. It is noteworthy in opposition to the detailed codes of duties that permeate the rest of the law. (Think of, for instance, all the crimes detailed in the penal code.) It is a language that lacks precision. The recognition of the right to privacy may be reassuring, but at first sight it remains debatable what privacy entails, against whom this right exists, and so on. If the focus is on the duty of state officials to abstain from entering into my house without my consent or judicial authorization, the picture is much clearer.

It should be noted that the initial uncertainty concerning the contents of rights will be remedied in the course of time through judicial decision making. Because of their lack of precision, rights depend significantly on judicial decision-making. For this reason, one could say that even in civil law jurisdictions, human rights law is essentially a judicial area of law.

Value of Vagueness Nevertheless, the fact that rights are vague and indeterminate may also be a benefit, as it means that the duties that are attached to human rights may adapt to the necessities of the times, as long as they fit within the logic of the right that generates them. This flexibility also contributes to the aspiration of the natural law tradition to moralize law. Through vague—and therefore flexible—rights, judges can avoid rendering an unjust decision just because the statutory law creates that effect.

The nonlegal dimensions of human rights also seem to justify the emphasis on rights. Morally, it may be argued that the inherent dignity of the person creates rights and that these rights come first; duties are a mere consequence of this. Politically, it is often more expedient to talk about rights than duties, as the language of rights seems to connect more powerfully with notions of human dignity than the language of duty.

Moreover, the inherent vagueness of rights makes it easier for parties to reach agreements about rights that are at first glance vague and uncommitted but that are later ironed out in more detail by judges (for whom this is compulsory) and other agents.

Following the American jurist Cass Sunstein (1954-), one can characterize human rights as incompletely theorized agreements. Politicians of different factions or different countries can agree that we have certain rights, even if the justifications for such rights or their concrete implications are unclear. These sorts of agreements may move things forward, when deeper agreements are unworkable.

12.6 The Content of the Rights

Having introduced some basic notions of the idea of human rights, we need to discuss the content of rights themselves. The limitations to the length of this chapter makes it is necessary to deal only with the most representative or important types of rights, and this means that a lot of detail must be omitted. Before addressing the various types of rights, it is necessary to make a few general remarks on what types of things are candidates for inclusion in a list of human rights.

12.6.1 The Importance of Human Rights

One general thing that can be said of rights is that their object cannot be something frivolous. They must aim to secure something that is essential to our enjoyment of human life in dignity.

> As stated by Henry Shue in his work *Basic Rights* (1996), human rights are
>
> "...the morality of the depths. They specify the line beneath which no one is to be allowed to sink".

For example, while it may be desirable that everyone has a job that allows her to develop all her capabilities and express herself creatively, such an aspiration is not of the purview of human rights. Human rights are concerned with ensuring that this person conserves her life, bodily integrity, and basic needs and freedoms and not with the high end of human flourishing.

Aspirational Rights Nevertheless, given the political nature of treaty or constitution drafting, it is not uncommon to find clearly aspirational rights that go far beyond the minimum and that are better explained by historical context than the logic of protecting basic dignity.

> For instance Article 15(b) ICESCR establishes the right of everyone
>
> "[t]o enjoy the benefits of scientific progress and its applications".
>
> Even more ambitious is the right to development as defined by the United Nations Declaration on the Right to Development. According to this document:
>
> "Every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

Core Rights The proliferation of rights that go far beyond the minimum has encouraged some jurists like Theo van Boven to distinguish special categories within human rights, identifying "core rights" such as the right to life, the right to food, and the right to be free from torture, in contrast with more peripheral, aspirational rights.

Admittedly, some would disagree with the idea of rights as minima. Some would like to use the idea of human rights as a fulcrum to push for comprehensive social reforms, sometimes even in a global level. The advocates of such a view seem to

stress the "political language" aspect of rights. They aim to use rights as catalysts for bottom-up political movements, but they deemphasize demands of legality.

> Warning against such approaches, political Scientist Amy Gutmann (1949-) writes: "Proliferation of human rights to include rights that are not clearly necessary to protect the basic agency or needs or dignity of persons cheapens the purpose of human rights and correspondingly weakens the resolve of potential enforcers. [It] also makes it far more difficult to achieve [. . .] broad intercultural assent to rights [. . .]".

12.6.2 Rights to Integrity of the Person

It is commonly assumed that there are two (or three, depending on how one counts) rights that protect the integrity of the person:

1. the right to life, and
2. the right to be free from torture and inhuman or degrading treatment.

These rights are the ones that are most directly related to the continued existence of the human person, who is the right holder. The right to life in particular is inseparable from the existence of a right holder, to the extent that it has been stated that the right to life is not just another right but sets forth the necessary precondition for the enjoyment of all other rights.

Torture and Inhumane Treatment In connection with the second right, usually a distinction is made between (1) torture and (2) inhuman and degrading treatment.

Precisely where the dividing line is drawn is not fully clear, and this is an issue that is still in a state of flux. Initially, the main difference between torture and inhuman treatment was taken to be that torture was more severe and more painful than inhuman treatment. Using this parameter, it seems to be very difficult to draw a precise distinction about where inhuman treatment ends and torture begins.

Nowadays, it has become more common to associate torture with inhuman treatment that is performed by the state for a specific purpose such as gathering information or punishing or intimidating the victim.

> The United Nations Convention Against Torture, Article 1 defines torture as follows:
>
> "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

This has the benefit of making the assessment whether a particular case involves torture easier. However, since torture is singled out in the conscience of mankind as one of the most heinous crimes possible, we have to ask whether what makes torture

really hateful is its objective or its severity. Here we have to look back at the political language dimension of human rights and recognize that the debate on how best to characterize torture may be merely a matter of words but that these words have accrued a large degree of political capital, and therefore a lot depends on the resolution of the debate.

> The power of certain labels can also be seen in the political and academic debate on whether the killings still taking place in Darfur can be called a "genocide". To some degree what is being discussed is not really what the facts are, but how to categorize them, and many feel that if the situation were to be called "genocide", the international response would be more forthcoming.

International Crimes Violations of integrity rights tend to be considered particularly severe. Most international crimes or categories of crimes, such as genocide, torture, crimes against humanity, or war crimes, involve violations of integrity rights.

12.6.3 Freedom Rights

Under freedom rights, we categorize the rights that traditionally have been considered as mostly "negative" and hence are called "freedoms."

"Freedom" rights create a sphere of autonomy for individuals, in which the state may not intervene. In practice, freedom rights include, most prominently, freedom of conscience, freedom of religion, freedom of speech, freedom of movement, freedom of association, and the right to privacy.

Together with the political rights and the right to property, the freedom rights form the core of the so-called bourgeois rights, rights that have historically been associated with the rise of civil government and mercantile power in the eighteenth and nineteenth centuries.

Limitations Almost all freedom rights expressly allow for limitations when the public good is at stake. Such limitations vary from banning television programs that are deemed to be harmful to minors to allowing surveillance of private conversations to stop criminal activities.

The Right to Property In a sense, the right to property may be characterized as just another freedom right, which requires that the state does not interfere with, devalue, or take one's property. However, some of its characteristics warrant that the right to property is treated separately.

First, property is not an interest that existed before the law protected it by rights. Property itself is a creation of the law, and the right to property may be understood as a guarantee for the existence of some system of property.

Second, the creation of property does not merely exclude interference with the object of the right by others than the owner, but it also *makes it possible* to transfer or encumber one's own property.

Expropriation Finally, it is noteworthy that the state may often simply take property as long as it provides fair compensation for it through the mechanism of expropriation. This means that it may be easy to overcome the right to property if what the state wants is a particular thing (a strategically valuable piece of land, for instance), but it will be hard for the state to gain an economic advantage because expropriation means that the state will have to pay a fair price for what is being expropriated.

12.6.4 Political Rights

The other half of the bourgeois rights is formed by political rights. Generally, these should include the right to vote in free elections and to be elected into office.

There is a strong degree of overlap between political rights and freedom rights because the freedoms of conscience, speech, and assembly have critical political dimensions, and usually the importance given to these rights by courts is heightened when they are exercised in a political context.

Limitation to Nationals It is generally accepted that the political rights of being able to vote and to be elected to office can be limited to only nationals.

> One could see political rights as an exception to the rule that human rights accrue to human beings purely because they are humans. To have political rights one may need a special legal status, such as having a particular nationality or being resident in a particular country.
>
> Even then, this should be seen in the light of the presuppositions that every person is a citizen of a country, and that statelessness is an anomaly. In reality, according to the United Nation's High Commissioner for Refugees (2009) there are some 12 million stateless persons in the world.

12.6.5 Socioeconomic Rights

Socioeconomic rights consist of a wide set of provisions that, fundamentally, aim at addressing the problem of poverty. The most notable socioeconomic rights include the right to an adequate standard of living, food, water, access to health services, education, housing, social security, and work.

Judicial Protection For most of these rights, it is understood that the state must provide the good for those who are unable to take care of themselves. As this task was seen as essentially an issue of economic organization and not fit for judicial decision, most of these socioeconomic rights were originally not protected judicially. This has led many to argue that they are not really rights, but merely political objectives dressed in the language of rights, because legal rights could not exist without judicial protection.

Nowadays, judicial protection of socioeconomic rights is becoming increasingly common. In connection with this, it has been emphasized that socioeconomic rights

also have "freedom dimensions" (the duty to respect discussed above), such as allowing the parents to choose the type of education that a child should have. These freedom dimensions are not issues of economic organization and therefore unproblematic candidates for judicial protection.

12.6.6 Equality and Nondiscrimination Provisions

Equality and nondiscrimination rights can be seen in a continuum, starting with provisions for formal equality, passing through provisions for material equality (of diverse sorts), and ending up with specific entitlements for individuals who are in a disadvantaged or marginalized position.

Formal Equality Provisions for formal equality require the state to treat everybody equally in a "blind" manner. So, for instance, both the poor and the rich, the black and the white are to be subject to exactly the same treatment under the law, both in legislation and in practice.

Material Equality Material equality provisions are meant to overcome the limitations of formal equality, which are best captured by the famous quote from Anatole France: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

To state the same point in less dramatic terms: a labor law that treats the employer and the employee in exactly equal terms ignores the wide difference in bargaining power between the two and encourages injustice rather than prevent it.

Specific Provisions Beyond this, there are specific provisions in constitutions and treaties for women, children, persons with disabilities, and so on. Like the political rights that are limited to nationals, these provisions seem to break the rule that human rights are universal and not the province of a particular interest group. Nevertheless, these particular provisions can be seen as having universalist logic if they are seen in the light of material equality. These rules simply list what material equality requires for a particular vulnerable group.

12.6.7 Fair Trial and Administration of Justice

Finally, we must consider rights that are relevant when one is subject to a judicial or administrative dispute. These sorts of rights have three functions. First, they control what the state can and cannot do to a person without passing first through judicial control. For instance, a state cannot criminally punish a person without a trial (see also Sects. 7.12 and 7.13.)

Second, these rights also control the functioning and authority of judges requiring them to follow a procedure that achieves certain levels of fairness and effectiveness. The list of these rights is quite large and may include duties as varied as

having to reach a verdict within "reasonable time" and maintaining the presumption of innocence.

Third, one must also consider what could be called rights of protection, a subset of rights that safeguards the existence and effectiveness of legal procedures to protect other rights. These include, traditionally, *habeas corpus* provisions and the right to a remedy.

> *Habeas corpus* (Latin for "You are to have the body.") is a legal action through which a prisoner challenges the legality of their detention.
>
> The right to a remedy is a guarantee that every citizen should have the possibility of recourse to court if his other rights are violated.

Amparo Procedure In Latin American countries, the existence and effectiveness of an *amparo* procedure, a special, expedited, and informal procedure for the protection of human rights, are also often included as a right itself.

12.6.8 The Interdependence and Indivisibility of Rights

A recurring theme about the content of rights is that they are interdependent and indivisible. These attributes stand for the alleged impossibility to comply consistently with one set of rights to the exclusion of another. It is held that all rights are interrelated and the violation of one sort of rights often implies the violation of another.

> For instance, some sorts of violence against women are said to be forms of discrimination. Similarly, a culture of discrimination gives rise to violence against women, as women are readily seen as inferior and offenders have expectations that their behavior will be seen as acceptable by society. In any case, such a scenario shows that the rights to life and integrity of the person can be related to those of freedom from discrimination.
>
> In connection to this, it is worthwhile to note the connections between freedom and welfare. In his work "Development as Freedom" (1999), the Indian economist Amartya Sen (1933-) emphasized that access to basic goods such as food, water, medicine and housing is related to an individual's possibility to exercise freedom in any relevant sense.

Favorite Rights The claims of interdependence and indivisibility have been an attempt to remedy the fact that states tend to pick favorite human rights to promote while disregarding others they consider less legitimate. So the US has had a tendency to promote civil and political rights domestically and abroad while obstructing the advancement of economic, social, and cultural rights, and some Arab states have pushed for a peculiar interpretation of freedom of religion that possibly undermines the right to freedom of expression as most scholars understand it.

12.7 The Boundaries of Human Rights

12.7.1 Rights as Trumps?

Human rights make a claim to hierarchy. They are not at the same level as the civil code, the labor code, the criminal code, or common law (in common law countries). As a matter of fact, one of the main reasons to have human rights is to limit the power of government, to define certain things that the government may never do or that the government must always do, notwithstanding what may be politically convenient at the time. For this role, human rights need to be above ordinary legislation.

> In his book "Taking Rights Seriously" (1977) American jurist Ronald Dworkin (1931–2013) famously described human rights as "trump cards": when a human right is involved, that right must be honored in spite of any other consideration, including legal rules that do not express human rights, but rather promote economic efficiency or political expediency.

Nevertheless, the promise of rights trumping "ordinary" rules is never truly realized for two reasons. First, when human rights are implemented as legal rights, hierarchy is not always fully recognized. Some constitutions do single out human rights as the highest point of the legal edifice, but others do not make them more important than other parts of the constitution.

The issue is even more complicated for human rights that have their basis in international law. It is unclear whether treaties have a higher rank than domestic constitutions. An international lawyer and a constitutional lawyer are apt to answer the question differently. Furthermore, within international law, different sorts of treaties, whether they formulate human rights or not, share the same hierarchical position, as do other sources of international law, such as custom and general principles. This means that a human rights treaty does not necessarily have to be superior to, say, a free trade treaty, and this makes it difficult for human rights to assert their role as "trump cards" at the international level.

Moreover, most or all implementations of human rights leave room for valid legal counters. That a right is in play, or appears to be in play, is never a sure win. Invoking a right is never the *coup de grace* argument that ends the legal dispute. On the contrary, counterarguments must be carefully considered and subtly balanced against rights. Four mechanisms play a role in this connection: (1) conflicts of rights, (2) limitations to rights, (3) exceptions to rights, and (4) temporary derogations in emergencies.

12.7.2 Conflict of Rights

Invoking a right cannot mean automatic triumph if the other party can also invoke a human right in his favor. This is quite common, as human rights often conflict with each other.

Consider a situation in which a celebrity sues a journalist for taking pictures of her when she is with her children, such as the *Von Hannover* case at the European Court of Human Rights (2004). The claimant invokes her right to privacy, but the journalist can invoke freedom of expression in his defense. At least at first glance, it seems that it is not possible for both rights to prevail; therefore there is a conflict.

Interpretation Of course that there is a conflict depends on interpretation to begin with. For instance, for the right to freedom of speech to conflict with nondiscrimination, it must first be established that "mere words" can as such discriminate and to define what really counts as "speech." Interpretation is always a value-laden, uncertain enterprise. In any case, once a conflict is established, two ways to solve it are available: hierarchy and balancing.

Hierarchy In theory, rights may be listed in a hierarchy from most important to least important, and in case of conflicts the more important right defeats the less important one. This solution is often repudiated because the relative importance of rights seems to depend on the facts of the case and cannot be determined beforehand.

Many people think that the right to life is always superior to the right to privacy, but this opinion might not hold in a particular context. Many think that the decision to end one's life is a private matter, and that the state should not interfere with it, even to protect life.

Furthermore, this strategy says nothing about cases in which two identical rights are pitted against each other.

An exceedingly tragic situation occurred in the case *Re A (Children) (Conjoined Twins: Surgical Separation)* (2001) decided by the English Court of Appeal. In this case, two conjoined infants could not survive together, and if they were separated, one of them would certainly die. This made it necessary for the doctors to separate them, at the cost of the life of one of them.

Balancing Another alternative for solving conflicts is case-by-case *balancing*. Instead of creating an abstract hierarchy independent of the facts of the case in which two rights are in conflict, each individual situation is looked at in isolation, and the judge decides which right is more important *in that scenario*. This solution is generally more acceptable but is criticized for the lack of predictability it brings. After all, how can we rely on our rights if we cannot know if they will be balanced out of existence?

An example of this is the so-called "freezing effect" discussed in the context of the right to freedom of speech: if one is not sure whether a certain speech is protected or not, and the issue is so uncertain that it may lead to protracted litigation, one may simply decide not to express one's ideas, losing the benefits of the right in practice.

Categorical Balancing These difficulties have pushed legal academics to find a middle ground between the predictability of hierarchy and the flexibility of balancing. One alternative would be the so-called "principled" or "categorical" balancing approach, where the court decides for a specific case which right is the more

important but in doing so formulates abstract criteria for determining the importance of a right that may be relied upon by citizens in future cases.

12.7.3 Limitations

Sometimes, rights go too far. If complying with rights may cause a great deal of harm to society, there is a point at which one might consider dishonoring the right to protect the common good. An even worse scenario is depicted by Jeremy Waldron: in certain cases, rights can be used to cause harm intentionally.

> For example, people have a right to privacy, but governmental authorities may be justified in restricting that right and invading their personal sphere in a limited fashion in order to guarantee safety and combat crime. Judicially authorized electronic surveillance is an example of this invasion of privacy.
>
> Also consider the so-called Jyllands-Posten Muhammad cartoons controversy of 2005. Certain cartoons depicting the prophet Muhammad provoked ire from the Muslim community in Denmark and abroad. In most interpretations, the cartoons were protected by freedom of expression, yet arguably the use of this right was abusive.

The doctrine of limitations of rights can be seen as an escape clause for these situations. Under this doctrine, rights are not fully trump cards—they are trump cards most of the time, but when certain (presumably rigorous) conditions are met, it can be legitimate not to honor the right.

Conditions on Limitation At the international level, there is significant consensus on the conditions under which a right can legitimately be limited:

- the nature of the right must allow limitations,
- the right must be limited to a legitimate goal,
- the limitation must be provided by law,
- the limitation must be proportional to the goal, and
- the limitation must be of such nature that it is necessary in a democratic society.

With regard to the first condition, it is generally accepted that some rights are truly absolute and cannot be limited. The longer lists of these absolute rights usually include freedom from torture, freedom from slavery, freedom of conscience, and the right to be recognized as a person.

The "legitimate aim" condition requires that the restriction be brought about by an actual interest in the common good and not by partial political interests.

The "provided by law" condition demands that the restriction be general and prospective rather than ad hoc.

The requirement of proportionality is a sort of balancing test; restrictions should not go beyond what is needed.

The construct of "necessary in a democratic society" represents the broader philosophical context in which the decision must be taken. Some restrictions of

rights should be unnecessary if we live in a society committed to values of tolerance and equality.

Core Content Beyond this, many academics argue that while limitations for nonabsolute rights are allowed, there is a minimum, an essence of every right that may not be limited under any circumstance. This essence is usually called the "core content" of the right.

12.7.4 Exceptions

Where limitations on rights can be seen as a way to push back the range of application of a right, exceptions are better pictured as "gaps" in the coverage of a right. Here, no balancing needs to take place, but it is important to determine the size of the gap and whether the case at hand falls into the gap or not. Some exceptions are specifically provided for in the law.

Known exceptions in United Nations human rights treaties include:
– the death penalty, as an exception to the right to life,
– hate speech, a form of unprotected speech, as an exception to freedom of expression, and
– lawful sanctions which may nevertheless cause severe suffering are an exception to the prohibition of torture.

Even if these exceptions appear it the law, they call for interpretation. Not all speech that is critical about a particular minority constitutes hate speech, and the determination of where to draw the line is an inevitably controversial.

In other cases, exceptions are crafted through interpretation of the right itself.

For instance, thinking about the absolute protection of freedom of speech found in the US Constitution, one could wonder whether forcibly obstructing the entrance of a shopping center in order to complain about capitalism is a form of "speech" or a different type of action.

12.7.5 Derogations in Time of Emergency

The last situation in which the trump card character of human rights is put into question is in times of emergency. In such situations, the government may be excused from complying with certain human rights, although some rights may never be suspended.

Again, some requirements must be met. It is commonly assumed that the suspension must be proportionate to the emergency, must serve some actual purpose, and is only allowed for a limited duration. Moreover, what counts as a legitimate emergency is debatable.

Maybe war with another country is a clear example, but other situations, such as the so-called "War on Terror" are apt to give rise to disagreement.

12.8 Protection of Human Rights

Rights are not merely good intentions. If a right is violated, one must be able to find a way to protect it. It is possible to identify three types of institutional actors that play a role in this connection, namely courts, politicians, and experts.

12.8.1 Protection by Courts

The protection of human rights by courts can be divided into two paradigms. Some courts are more "constitutional" in style and focus more on repealing state policies and legislation that violate human rights.

> The power to strike down legislation creates the so-called anti-majoritarian problem: why should a judge be able to override democracy? The issue of judicial review of national legislation against human rights is further discussed in Sect. 8.2.8.

Other courts focus more on individual justice. With some caveats, international courts tend to fall into this second paradigm.

At risk of oversimplifying things, it could be said that an international procedure for rights protection typically involves three stages.

Admissibility The first is a stage of "admissibility," where the court has to decide whether the claim satisfies several formal requirements for being considered by the court, such as whether the claim really involves a human right, whether it has been timely filed, and whether domestic remedies have been exhausted.

> For example a tax claim should normally not be presented to a human rights court and will not be deemed admissible.

Merits If a claim is found admissible, that does not guarantee that it will be found valid. That second judgment depends on the "merits" stage of the proceedings. Here, the court will assess the law and the available evidence to determine whether a human right has been violated or not.

Remedies If the court determines that a human right has been violated it passes to the "remedies" stage of the proceedings. Here, the court will determine which reparations should be granted by the state to the victim of human rights violations.

> The stage of remedies allows for many different approaches. It can be said that traditionally, the European Court of Human Rights has tended to order only remedies of "compensation" -that is, monetary remedies- and to consider the judgment itself as a form of moral redress.
> By contrast, the Inter-American Court of Human Rights has tended to order much more extensive forms of redress, including measures of restitution such as orders for the state to create medical dispensaries in communities disrupted by human rights violations or to put memorials for the victims.

The type of remedies these courts may order is in state of flux and through various mechanisms the European Court of Human Rights is becoming much more flexible with regards to the remedies it can award.
Expansive remedies tend to close the gap between the "constitutional justice" and "individual justice" paradigms discussed above.

12.8.2 Protection by Political Bodies

Politicians may be relied upon to protect human rights both domestically and internationally—domestically, because members of parliament are expected to legislate in a way that furthers the aim of the bill of rights. Internationally, bodies like the United Nations Human Rights Council or the Committee of Ministers of the Council of Europe are political forums in which state representatives are expected to push a human rights agenda.

Needless to say, political methods of human rights protection are inevitably politicized, and politicians may see rights as just one more bargaining chip to be used in negotiating a good outcome, which runs against the whole logic of rights being trumps. Nevertheless, this is not necessarily a bad thing. For one, an overly legalistic approach to rights might be too rigid and impractical and lead to counterproductive results.

Transitional Justice In relation to this there is a very important discussion in the field of transitional justice. This is a field of study that tries to determine what is just in societies that are emerging from war, a dictatorship or similar catastrophe (such as the civil war in ex-Yugoslavia, the genocide in Rwanda, apartheid in South Africa and the Argentinean and Chilean dictatorships.) The discussion concerns the tension between justice and peace. Should the emphasis lie on justice-understood as pursuing the criminals and repairing the harm done to the victims- or should be emphasis be on peace, on putting conflict behind us and securing stability and development, maybe deferring criminal prosecution for five or ten years or indefinitely? A thoroughly legalized vision of human rights often cannot consider "peace" as an option even if it is shown that an overzealous pursuit of justice may end up doing more harm than good.

Most of the time, enforcement of rights depends on politicians, and therefore politicians must be included in the process of human rights protection. Otherwise, there is a risk that the system will function in a vacuum without any practical effect.

12.8.3 Protection by Experts

Experts can be seen as a category in between politicians and courts. They are not usually given the power to create laws. There may be several reasons why they can deemed to interpret the law in an authoritative way, however. They may be anointed with some official recognition; they can be individuals with a high moral standing; they can have expertise, which becomes clear from their arguments; or they can

have some combination of the above. Nonbinding interpretations of human rights by experts usually gives rise to soft law: these interpretations are not legal sources but nevertheless are a persuasive guide on how the "hard" law should be understood.

Experts are not as prone to bargaining rights away as politicians, but they are less constrained by law and legal procedures than judges. As a consequence, they can be a suitable medium to resolve claims of less importance, to act in situations that need a more rapid reaction than what judges or politicians can provide, or to address the predicament of claimants, who due to lack of resources, or due to being an oversized group, have problems in presenting claims for justice judicially.

From the three institutions discussed, it seems that experts are also the most likely to take an "activist" or "progressive" stance on the law and push for interpretations that favor the vulnerable.

Conclusion

Nowadays, it is impossible to approach the law—domestic or international—without reference to human rights, and almost no one is against human rights. Nevertheless, this superficial agreement hides deep tensions. There is profound disagreement on what the human rights are, on which duties they give rise to, and on the proper methods for implementation.

It is dangerous to treat human rights uncritically because the relationship between human rights and the human good is bound to be a contingent one. Support for human rights must not preclude us from questioning the foundation of rights, their role in the law, and their effectiveness in society. Quite on the contrary, reflection and critical thinking are a vital part of a healthy culture of rights.

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Elements of Procedural Law

13

Fokke Fernhout and Remco van Rhee

13.1 Introduction

In law, there are always at least two sides to every issue: parties to a contract often disagree about its interpretation; heirs have different views on the meaning of a will; the public prosecutor holds the evidence to be sufficient, whereas the suspect denies the charges. Even in cases in which only less specific interests like public order are at stake (when it comes to appointing a guardian for a minor, for instance), the persons concerned will probably disagree about the way those interests tend to overrule their private objectives.

If these issues are indeed of a legal character, ideally there will be a best solution in the eyes of the law; ideally, because all stakeholders will have very good reasons why the solution that fits them best is the solution prescribed by law. To decide these matters, a third person or institution is needed. Leaving the decision to one of the parties involved would indeed be unwise. There is little hope that they will choose the solution that would be in accordance with the law instead of serving their own interests. This is a good reason for any social system with legal rules to have some kind of institution to resolve legal disputes by applying the law, instead of making a choice between the interests of the parties.

13.1.1 Alternative Dispute Resolution

There are other good reasons for such an institution. If it would be for settling disputes like the above, this institution would only be necessary if the parties would

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not be able to solve their disagreements themselves. And indeed, most societies primarily leave it to the parties to find a solution of their own. Maybe somewhat misleadingly this is labeled as "alternative dispute resolution" (ADR), which comes to us in many forms, like arbitration, mediation, and binding advice from—for instance—experts. Other approaches in this vein are preventative law (aiming at helping parties to find solutions out of court) and collaborative law (where parties even enter a contract enforceable by penalties not to start proceedings).

Speaking of *alternative* dispute resolution is misleading since the genuine way of solving disputes in permissive societies is in fact leaving dispute resolution to the parties themselves. "Primary dispute resolution" would have been a better term. The state institutions that are provided are only there to solve matters people cannot solve themselves. Even the decision to try to find a solution at all is, in most societies, left to the parties themselves, although in socialist settings state-initiated procedures on behalf of citizens against other citizens are not excluded.

13.1.2 The Judiciary, Courts

Nevertheless, most jurisdictions agree that some decisions should not, under any circumstances, be left to citizens at all. This is especially the case if it is a public policy matter. Family relations, for instance, are defined by law, and it would be a bit odd if we would allow citizens to label themselves at random as the father or mother of someone else. Likewise, if you want to prevent misuse of drastic punishments like imprisonment, it is better to have a state-controlled institution dealing with it, rather than allowing victims setting the level by retaliation.

All these questions are a matter of administration of justice. How can we guarantee that justice will be done in a society in which the law has to be respected by everyone, even the state and the legislature itself? This requirement of the rule of law calls forth the need for an institution that can be relied on as administering justice in accordance with the law in force. This power of deciding on the contents of the law and applying it if necessary is attributed to an institution labeled as "the judiciary" or "the courts."

Principles The way this is done, the scope of the judiciary's powers, and its position within the framework of the state may vary from jurisdiction to jurisdiction and are not even constant within a given jurisdiction. Traffic fines, for instance, were originally a matter of the courts but are now imposed by the administration in most jurisdictions. However, some general principles are generally recognized as suitable or even necessary safeguards for a judiciary that can be relied on as regards respect for the rule of law. These principles can be found in various legal instruments, varying from national constitutions to international treaties and declarations.

> Compare for instance Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). These provisions and especially the case law of the European Court of Human Rights (ECtHR) on the latter article allow us to describe these principles in more detail. Case law of the ECtHR is the

main source for the concept of a fair trial and related institutional and procedural matters, since it is the only international court that can be appealed to directly by individual citizens complaining about a violation of their rights under the Convention (Article 34 ECHR). This has led to a vast amount of leading case law (www.echr.coe.int/hudoc), which is accessible in English and French. Some important cases will be mentioned in this chapter.

13.1.3 Overview

This chapter will first deal with the fundamental principles governing court systems respecting the rule of law. These principles will be divided into institutional principles and procedural principles. This distinction has no legal consequence, but it helps to give a clearer picture of the ways in which safeguards can be obtained.

The principles of independence and impartiality are institutional. They are discussed in Sect. 13.2.

Principles with direct consequences for the way legal proceedings are conducted are procedural. They are discussed in Sect. 13.3.

The last but one section of this chapter (Sect. 13.4) introduces some general aspects of the administration of justice by courts and court proceedings in general. Court decisions require proceedings, and there are some general aspects to these procedures that are worth remarking on.

13.2 Institutional Principles

The institutional principles relate to characteristics of the court system itself and are generally considered to be essential for the proper administration of justice under the rule of law. These principles are

1. judicial independence and
2. judicial impartiality.

13.2.1 Judicial Independence

The requirement of judicial independence is evident for every legal system that is based on the principle of separation of powers. The balance between the three powers (legislature, judiciary, and executive) is only guaranteed if disputes over the content of law are settled by a power that cannot be influenced by the other powers. This brings the concept of a fair trial (in its broadest sense) to the core of modern, democratic societies. But even apart from constitutional choices, the notions of a proper administration of justice and independence are inseparable. Independence, after all, is equal to the absence of undue influence, thus allowing courts to decide freely on the contents of the law and its just application.

13.2.1.1 Appointment for Life

Independence itself can be realized in several ways. In many states, the appointment of judges for life is part of this concept. Judges who are appointed for life will not easily tend to give decisions that favor the government out of fear of being fired if they do not. In the same vein, decisions about the recruitment of new judges and their discharge are, in most cases, either the exclusive domain of the judiciary itself or done in cooperation with the central government in accordance with strict procedures. Leaving the appointment of judges to the executive alone will give it a powerful tool to influence the policy of a court, as can be learned from the way Justices of the American Supreme Court are appointed (i.e., by the President). Independence of judges can also be guaranteed by the constitutional requirement to regulate their legal position by statute.

13.2.1.2 Judicial Budget

Allocation of money to the judiciary forms a related problem. If the central government itself would take all decisions concerning how budgets for the judiciary are fixed, and how the money is spent, these cash flows could easily be directed in the direction of courts taking the most favorable decisions. To avoid this, an institution like a Council for the Judiciary could be positioned in between the central government and the judiciary, with the task to allocate the budgets and to supervise the quality of the courts' output.

13.2.1.3 Contempt of Court

The notion of "contempt of court" may also be seen as part of the requirement of judicial independence. This notion includes (among other things) that parties, the media, or the public are not allowed to comment on a procedure pending before the court (cases that are *sub judice*) beyond a certain point since these comments could influence the court.

The notion is—in varying modalities—part of the law of, for instance, the United Kingdom, Cyprus, Ireland, and Malta: jurisdictions in which the courts have the power to take measures (sometimes draconic, like immediate arrest) in case of contempt of court. Although many countries do without this strict form of contempt of court, the belief that some caution has to be observed when giving an opinion regarding pending cases is generally shared.

13.2.2 Judicial Impartiality

Human rights treaties stipulate not only that tribunals be independent but that they be impartial as well, for obvious reasons. If we want our courts to decide according to the content of the law, they are not allowed to favor one of the parties in any way.

13.2.2.1 Recruitment

Having to deal with real people and not with computers, we have to bear in mind that even judges might be tempted to disregard their professional obligations.

Therefore, judges should be carefully selected and schooled. A psychological test could be part of the procedure, as well as interviews and simulations of court sessions with actors. In addition, every candidate should be screened, should be able to present recommendations, and should pass a test.

13.2.2.2 Remuneration

Guaranteeing impartiality costs money. Judges should not be tempted to take money in exchange for certain decisions because their remuneration is not sufficient to satisfy needs that must be deemed reasonable in relation to their social position. Their salaries should therefore be at least as high as what a private lawyer would gain, and preferably slightly higher. Paying less and counting on their magnanimity mean asking for trouble.

> A fine source for judges' starting salaries can be found in the bi-annual reports of the European Commission for the Efficiency of Justice (CEPEJ). In Europe, the common law countries remunerate their judges far better, with 4–5 times the national average salary (€ 110,000 a year). France and Austria really take risks with only factor 1.1 (€ 40,000). These figures are food for reflection: what do these differences tell us about the position of the judicature in the state framework?

13.2.2.3 Exemption and Challenge

Exemption Judges who feel that their impartiality might be questioned in a certain case should exempt themselves, either by following a formal procedure provided by national law or by arranging informally that he or she will not decide the case.

Challenge If, nevertheless, parties have good reasons to suppose that a judge trying their case is prejudiced, even though he has not exempted himself, national law should provide a procedure to challenge this. Of course, this is a sensitive matter since who should decide on a challenge? Although it is evident that only judges should take the decision, it has the drawback that the impartiality of a judge will be judged by his colleagues. To guarantee their neutrality, challenge chambers can be recruited from judges of other courts. The case itself should be stayed awaiting the outcome of the challenge since a potentially partial judge should not be allowed to take any decision before his impartiality has been established.

After a challenge, impartiality is assessed by applying a double test. The subjective test should establish whether the judge acts with personal bias, i.e. on a personal conviction that favors one of the parties. According to the objective test, "it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality" (ECtHR 24 May 1989, *Hauschildt v. Denmark*).

> Mogens Hauschildt was suspected of a massive tax fraud for which he was taken into detention on remand. The judge who had to decide on orders of further remand in custody also presided over the trial itself. Since the orders of remand were based on an assessment of the evidence against Hauschildt, which should have provided a "particularly confirmed

suspicion", the impartiality of the court became open to doubt and did not pass the objective test.

13.2.2.4 Private Life

Safeguarding impartiality also has implications for the private life of a judge. Although most fundamental freedoms are not denied to them, their use of, for instance, their freedom of speech requires some moderation. Strong affiliations with political parties or pressure groups could give rise to doubts about their impartiality and neutrality. Even in their private lives, they should be aware of possible appearances that would undermine their credibility. Playing golf and leaving on holidays with advocates should, in most cases, exclude the handling of cases of those same advocates even if the judge concerned feels completely free to give a judgment in accordance with law.

13.3 Procedural Principles

Procedural principles focus on the proceedings before the courts more than on the organization of the judiciary. These principles should be observed by the legislature, but they can also serve as guidelines for the courts when handling a case. Even parties themselves could be affected since they should not be allowed to frustrate each other's rights to a fair trial.

These principles will be discussed under five headings:

1. the right to access to justice,
2. the right to a fair hearing—fair trial,
3. the right to a public hearing,
4. the right to judgment within a reasonable time, and
5. the right to enforcement of the judgment.

Again, this classification does not have legal consequences and treating the right to (for instance) a public hearing as part of the right to a fair trial, would not change its scope or meaning.

13.3.1 Access to Justice

A court system, as perfect as it might be, would be idling if citizens could not get access to it. Procedural codes establishing the most perfect trial imaginable would be useless when they would not open the gates to those who are seeking justice. Therefore, the right to access to justice is implied in the right to a fair trial even if it is not stated literally in the human rights conventions (ECtHR 21 February 1975, *Golder v. United Kingdom*).

By the 1960s, Parkhurst Prison on the Isle of Wight had developed into a top-security prison. It held Britain's most reputed and dreaded criminals, like "Mad" Frankie Frazer, the Kray twins and the Yorkshire Ripper. Rules were very tight and visitors were practically not allowed. On October 24, 1969, at 7 pm, an unprecedented prison riot came about. More than a hundred prisoners barricaded themselves in an association room, taking seven prison officers hostage.

Syd Golder was falsely accused by one of the wardens of participating and assaulting prison officers. Golder asked for leave to get in contact with his solicitor to commence a civil action for libel, but the answer he received politely informed him that the Secretary of State had considered his petition but had found no grounds to take any action. Golder submitted a complaint to the ECtHR, claiming that his right to a fair trial had been violated. The UK government replied that there had been no trial, so it could not possibly have been unfair. This led the ECtHR to its famous decision that the right to access of justice is implied by the right to a fair trial.

13.3.1.1 Scope

This calls for a definition of the scope of this right to access to justice since it is obvious that courts are not there to decide on just any matter (like the color of your shoes for the gala dinner). In the introduction to this chapter, we already pointed out that courts are there to settle disputes for those who cannot find an agreement themselves and to decide on matters we do not want to leave to citizens at all. The right to access to justice is therefore usually related to the determination of criminal charges and of civil rights and obligations.

At first sight, this seems to imply that only civil and criminal procedure is affected by this principle. However, since it is such a basic principle, these notions (which are mentioned in the provisions cited in the introduction to this chapter) should be taken in a broad sense. Thus, if private interests of a legal character are at stake, access must be opened to a court, even if the other party is the state itself and not a private person.

Judicial Review Likewise, a right to some sort of judicial review (i.e., the right to annulment of state acts by the judiciary) of certain administrative acts and legislation can be derived from the right to access to justice.

13.3.1.2 Legal Aid

Guaranteeing access to justice implies more than just opening a procedure to have a court decide on a matter. Although somewhat trivial, money should be one of the concerns of each jurisdiction in this respect. Going to court costs money, especially if representation in court is obligatory. To start a procedure, in most jurisdictions, a writ of summons has to be served by a bailiff and court fees have to be paid in court. Attorneys and solicitors are expensive. What should we do with people who cannot afford to litigate? A right of access to justice entails some kind of facility enabling citizens of little means to start proceedings or defend themselves in court. State-sponsored legal aid could be such a facility.

Under Irish law, divorce was impossible, but instead a judicial separation could be obtained by a High Court decree on one of three grounds: adultery, cruelty or unnatural practices. The ground had to be proven by witnesses, which necessitated legal assistance. Mrs. Airey lacked the money to pay a solicitor and thus could not obtain a judicial separation from her violent and alcoholic husband. The ECtHR found a violation of the right to access to justice, thus also imposing on governments a positive obligation to facilitate this access. However, the Court expressly did not set any standard for dealing with this problem. The cases in which and how access has to be guaranteed, will depend on the circumstances (ECtHR 9 October 1979, *Airey v. Ireland*).

13.3.1.3 No Cure No Pay

A more indirect way to guarantee access to justice can be created by allowing "no cure no pay" agreements, contingency fees, or conditional fee agreements (CFA's). What all these lawyer–client agreements have in common is that they are outcome dependent, freeing the client from (part of) his obligation to pay when the case is lost. The risk of losing money by litigating is then shifted from the client to the lawyer. Some countries have accepted these outcome-related fees with the specific objective to guarantee access to justice. On the other hand, most European countries have limited these agreements in some way to obviate immoral conduct of lawyers, the risk being that under an outcome-related fee agreement, lawyers' own interests will prevail over the interests of their clients.

13.3.1.4 Excessive Formalism

Another issue in relation to access to justice is the application of formal, procedural law. Procedural law always imposes restrictions on access to court. Such restrictions are even called for by its nature, i.e. the nature of the right of access to justice. Access to justice cannot be unlimited and unregulated, so national law will decide on the procedures to be followed and the time limits, periods, and formalities to be observed. This leaves a certain margin of appreciation since the actual contents of these restrictions are to be chosen and imposed by the national authorities. However, these restrictions

1. may not impair the right of access to justice in its essence (which might be the case if a procedure is only available under conditions that can hardly be met),
2. must pursue reasonable objectives, and
3. must be proportionate to these objectives.

Failure to comply with any of these three requirements is labeled as "excessive formalism." Thus, a decision to declare an appeal inadmissible because the number written on the file was erroneous would violate the right of access to justice as a result of excessive formalism even if such a number is required by national law.

13.3.1.5 Periods for Legal Remedies

A related consequence of the right of access to justice concerns periods and time limits for legal remedies. In every jurisdiction, these time limits tend to be fixed and

inflexible. Legal certainty about the status of judgments (i.e., whether they are final or not) is more valued by domestic law than fairness and equal chances. A party who failed to appeal in time will have to bear the consequences of the judgment even if it was legally wrong. However, if the expiration of a period for a legal remedy cannot in any way be imputed to the party concerned, it seems reasonable not to apply these periods in the light of the right of access to justice.

> When their father died, the life insurance payment of the Stagno sisters was deposited in their mother's account. Instead of administering this money to the benefit of her daughters, she spent everything. Proceedings were impossible, since the mother was the only one who, according to Belgian law, could represent her minor daughters in an action against herself, which she obviously would never start. A civil action was later dismissed because the limitation period had expired. This constituted a violation of the right of access to justice (ECtHR 7 July 2009, *Stagno v. Belgium*).

13.3.2 Fair Hearing: Fair Trial

Legal proceedings have to be fair, which means that every party should have a reasonable opportunity to present every relevant aspect of his case to the court. This fairness relates to all parties equally and refers to all stages of the proceedings. If we describe this by the right to a fair hearing, we should bear in mind that "hearing" is not to be taken literally. And if we use the term "fair trial," then we do not mean a trial in its narrow sense of a court session. In this chapter, the right to a fair trial is broken down into six distinct parts:

1. the principle of audiatur et altera pars,
2. the right to equality of arms,
3. the right to be present at the trial,
4. the right to an oral hearing,
5. the right to produce evidence, and
6. the right to a reasoned judgment.

13.3.2.1 Audiatur Et Altera Pars

From its other Latin version—*audi et alteram partem*—it emerges even more clearly that this principle is actually a command to "hear the other party as well," addressed directly to the courts. Courts should hear both parties and give both parties equal opportunities to react to each other's statements. Just hearing the parties is of course not enough; the courts have to consider the arguments put forward as well.

Lites finiri oportet The fear for procedures going on endlessly because of this principle is unfounded. Procedural law respecting the principle of *audiatur et altera pars* is allowed to limit the possibility to introduce new statements, in which case there is no need for another round. If a party comes up with new statements when this is no longer allowed, the judge should ignore those. The justification for this is

found in the ancient principle that all proceedings should come to an end at some point (*lites finiri oportet*).

> Modern procedural law tends to allow only one round of written statements before "going to trial." That was quite different in the nineteenth century. In England, for instance, the written part of the proceedings could extend itself from the statement of claim to the statement of defense, the reply, the rejoinder, the surrejoinder, the rebutter and the surrebutter. The situation in other countries was not much different.

The concept of this principle of *audiatur et altera pars* extends to everything that is brought to the attention of the court with the aim of influencing its decision. Thus, the parties have the right to comment on submissions of court advisors like the "Advocate-General" (ECtHR 30 October 1991, Borgers v. Belgium).

Sometimes, hearing the defending party might ruin the case of the other party, especially when merely by informing the party of the request would reveal information that should remain secret for some time (for instance, when a creditor seeks permission to attach the debtor's bank account). In those cases, many jurisdictions allow courts to take decisions on the request of one party (decisions *ex parte*) and hear the other party only afterwards.

13.3.2.2 Right to Equality of Arms

The right to equality of arms implies that parties should have equal opportunities in presenting their case. If, for instance, one of the parties is granted the right to hear witnesses, the other party should have the same right. The ECtHR derived from this principle the notion that excluding party witnesses from taking the stand amounts to a violation of the right to equality of arms (*Dombo v. the Netherlands*).

> Until 1988, the Netherlands did not allow parties to take the stand. Their testimony was regarded as one-sided and not trustworthy as of right. This rule was extended to those persons who could be identified with a party, like the managing director of a company with limited liability. When the company Dombo commenced proceedings against its bank regarding their financial relationship, it had to prove that a contract had been concluded to extend the existing credit arrangements. On Dombo's side this arrangement had been negotiated by its managing director, whereas the bank was represented by one of its employees. Thus the witness of the bank could be heard, but not Dombo's. The right of equality of arms was violated, which forced the Netherlands to change its rules of evidence (ECtHR 27 October 1993, *Dombo v. the Netherlands*).

The scope of this principle is slightly controversial. Taken in its sense above, it is strictly procedural. Within the procedure, parties should have equal opportunities, but that does not alter the fact that opportunities are not equally distributed in society. Everyone knows that social and economic differences could favor one of the parties, for example when a multinational is starting legal proceedings against one of its employees. A more material interpretation of the principle would require a procedural remedy for these social and economic inequalities. Usually, the principle is interpreted in its narrow sense, leaving the circumstances of the parties to substantive law.

Legal Aid Some procedural facilities could be seen as a material approach to the problem of equality of arms. State-funded legal aid is an example mentioned before. In some jurisdictions, no costs orders are issued against citizens in procedures against the state.

Class Actions Interests shared by many citizens can sometimes be bundled in various ways, thus creating "class actions" against mighty opponents who otherwise would not have to fear anything from their customers (think of trifling claims of consumers not worth going to court that, when bundled, represent a lot of money).

13.3.2.3 Right to Be Present at Trial

From the right to be heard and the right to react to the statements of other parties, it can easily be derived that every party (in criminal as well as civil cases) has the right to be present when it comes to a court session where his case is discussed. But there is more to it. A party has the right to be present when witnesses are heard; he has the right to be confronted with the other parties, to see the judge, and to be seen by the judge. Physical presence and observation of physical appearances can be of utmost importance for the way a case is pleaded.

Procedural law should take care of, first, safeguarding this right and, second, of formulating exceptions in a careful way. Precise rules governing the summons to a trial should guarantee that these summons will actually reach the party concerned and at least stipulate that hearings have to be stayed if this condition has not been met. Court powers to exclude parties from a court session or to deny them from being present should be limited to interests that are undoubtedly of greater weight. Examples can be found in the mental health of victims taking the stand, in due process, or in state security issues.

13.3.2.4 Right to an Oral Hearing

The same idea underlying the right to be present at trial (i.e., the idea that a direct confrontation with the court, parties, and witnesses could make a difference) leads to the right to an oral hearing. Each party is entitled to "his day in court" before the judgment is given, and courts cannot decide before having heard the parties in a court session. Face-to-face confrontations are useful or even necessary—is the idea—to bring out truth and to help the courts to reach a just and fair decision.

Principle of Orality This "principle of orality" is an ancient concept that is easy to conceive since societies existed long before script was invented. This might be the reason why jurisdictions with a demonstrable tendency to conservatism and traditionalism still embrace this principle in a pure form, including all its consequences. In this vein, everything that is shown to American juries should in principle be read out loud. While this may seem time consuming to continental lawyers, it is clear that a written statement of a witness can never replace a cross-examination when it comes to getting an idea about the reliability of the witness's declaration. Designing

procedure therefore means to strike a proper balance between written and oral forms of procedure.

Principle of Immediacy Closely related is the principle of immediacy. According to this principle, everything on which the court should base its judgment has to be produced in the presence of the court in an oral hearing. Even if the principle of orality is not embraced, this could mean that written evidence is only allowed to be used in a judgment if it has been read out aloud in the presence of the parties or accused, who had the opportunity to respond and comment on it.

The weight of this principle is valued higher in criminal than in civil cases. Accordingly, many jurisdictions order a retrial if a criminal judge has to be replaced, whereas the substitution of judges in civil cases is often (with exceptions, like Germany) merely considered undesirable but without further consequences.

13.3.2.5 Right to Produce Evidence

Claims and defenses are in most cases based on alleged facts. If those alleged facts are indeed underpinning what has been put forward but has been disputed (by one of the parties, by the public prosecutor, or maybe by the court itself), the right to a fair trial entails that these facts will be the object of evidence and (following from the principle of equality of arms) counterevidence. In other words, no claim or defense should be dismissed simply because the court does not believe the alleged facts.

> Perić had a contract that stipulated that her neighbors would take care of her the rest of her life in exchange of all her property after her death. She claimed termination of the agreement for a breach of contract. The court ordered hearing of witnesses on both sides. However, after hearing the witnesses of the neighbor the court decided that the case was clear and that Perić's witnesses would not be heard. Obviously, her claim was dismissed. This violated her right to produce evidence (ECtHR 27 March 2008, *Perić v. Croatia*).

13.3.2.6 Right to a Reasoned Judgment

Losing a case in court is not an enjoyable experience, but it is even worse if you don't know why. Even winning without knowing why is only a mixed blessing. Court decisions should be verifiable and acceptable, the first requirement allowing one to follow the reasoning and the second requirement allowing one to approve of it, if it is in accordance with the law. Courts should therefore give reasons for their decisions.

This does not mean, however, that every argument of the parties has to be discussed in detail. Only essential statements that could affect the outcome of the case have to be considered. Likewise, some decisions are merely preparatory and do not touch on the rights and obligations of the parties (like fixing the date of a trial), in which case grounds are not needed at all.

Secret of the Deliberations The way grounds for decisions are given depends on the domestic legal system, legal culture, and legal tradition and on differences with regard to statutory provisions, customary rules, legal opinion, and the presentation

and drafting of judgments. In some civil law jurisdictions, for instance, great importance is attached to the fiction that the judiciary can be seen as a unity, speaking with one mouth and giving its unequivocal opinion. All judgments (civil, criminal, and administrative) are in writing, and they give their reasons in full (discussing all essential statements the parties have submitted), but if unanimity is not reached only the opinion of the majority of the judges is published. The publishing of dissenting opinions is even forbidden and constitutes a criminal offense (secret of the deliberations *in camera*).

Dissenting Opinions Common law jurisdictions follow a system that is different but not incompatible with the principle of a right to a reasoned judgment. In those jurisdictions, judgments are often oral and the written version will not contain any reasons at all, just the provisions of the verdict. On the other hand, common law judges often produce a written opinion on the case, either concurring with the outcome of the case or dissenting from it. These opinions tend to investigate all legal dimensions of the problem at hand without entering into a debate with the submissions of the parties. This approach is understandable against the background of common law, where the development of certain fields of law (like tort law) is left to the courts.

13.3.3 Public Hearing and Public Pronouncement of the Judgment

An administration of justice that is fair can only exist in an open setting. Public and media must be allowed to witness hearings and to comment on them afterwards. This way of public control compels courts to stick to the straight and narrow path of justice since deviations will be noticed, criticized, named, and blamed. Exceptions to this rule (closing the doors) should be formulated with caution.

> Art. 6 ECHR allows closing the doors only "in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

In addition, judgments themselves should be given in public. The interest of justice itself is served by public judgments as well since this will help scholars, lawmakers, and courts to develop the law by studying, discussing, and commenting on the reasoning of the courts. In fact, common law could not even exist if judgments were kept secret.

In a modern society, pronouncing every judgment is virtually impossible and at least very impractical. Having regard to the number of cases and the length of the judgments, there is not enough manpower and time to read out loud all judgments. And besides, who would care to come and listen? In European jurisdictions, most judgments are only virtually (by means of a fiction) pronounced in public. In

agreement with the spirit of Article 6 ECHR, the pronouncement in public has been substituted by the much more effective right given to every citizen and organization to demand a certified copy of every judgment they are interested in. In addition, the most important decisions are made available on the Internet without charge.

13.3.4 Judgment Within a Reasonable Time

Justice should not only be just; it should be fast as well. Long delays amount to denying justice since in many cases parties cannot go on with their lives (or with their mutual relation) without a court decision. International human rights treaties therefore stipulate that courts should deal with cases "within a reasonable time," thus forbidding any undue delay.

The circumstances of the case, the nature of the proceedings, and the overall course of the procedure determine the reasonableness of an eventual delay. To assess delays, the entirety of the litigation or procedure, including appeal, cassation, and enforcement proceedings, should be taken into account. The circumstances of the case could include the complexity of the matter at hand, the conduct of the parties and the relevant authorities, and what is at stake in the dispute.

In general, in criminal cases, a delay of 2 years for any step is considered to be unreasonably long. This could lead to the inadmissibility of the claims of the public prosecutor or a milder punishment.

In civil cases, a violation of the right to a judgment within a reasonable time will only follow after approximately 10 years, depending on various circumstances. The consequences of undue delay in civil cases cannot be translated to winning or losing a case since both parties will be the victim of the same violation. The best remedy will be damages to be paid by the state.

13.3.5 Right to Enforcement

Just as a right to a fair trial without access to justice would be meaningless, the same can be said of a right to a fair trial without means of enforcing court decisions. The right of access to justice would be illusory if court decisions are allowed to remain inoperative. Moreover, the enforcement of the decision should lead to a result without undue delay (ECtHR 19 March 1997, *Hornsby v Greece*).

The means of enforcement can vary from jurisdiction to jurisdiction. Some jurisdictions leave enforcement to the parties (with the bailiff as intermediary); other jurisdictions require a separate order allowing the winning party to take more stringent measures (like attachment of salary) against the losing party.

13.4 Some General Aspects of Procedures

Rules regulating legal procedures change all the time, but it is not only for that reason that studying procedural law can be quite demanding. Procedural rules are mostly interrelated, and their meaning depends on precise and well-defined concepts. That may lead to puzzles (If A has an inheritance lawsuit against B in court C, can this be combined with a claim of B against D living in district E?) that will bring back unpleasant memories of mathematic exams in junior high school.

What could help is having some insight into what kind of rules and regulations those procedural regulations will usually contain. In fact, codes of procedure are mostly about the same things, regardless of the actual jurisdiction. Realizing this will get you on the way to the core of the meaning of all those rules and will also put you on the trail of the traps that you could encounter on your journey through this jungle. This section is therefore devoted to some general aspects of procedural rules.

13.4.1 Jurisdiction

The judicature always is composed of different courts with different functions. Each of these courts has its specific jurisdiction. The jurisdiction of a court defines the scope of its judicial powers and activities. For the parties, the designated court is the one that is competent to deal with their case. Regulating jurisdiction is inspired by many, and different, considerations.

13.4.1.1 Territorial Jurisdiction

For instance, regulating jurisdiction might be called for to avoid backlog and congestion of the court system. If parties would be allowed to choose a court at their convenience, probably after some time popular courts would be overloaded with work. Parties are economic beings and tend to maximize their profits. If *forum shopping* is not discouraged or impossible, it will certainly happen. Regulations regarding territorial jurisdiction (jurisdiction *ratione loci*), dividing the work between courts of the same level (like district courts), offer a simple and effective solution. However, the right of access to justice will impose some constraints on the choices to be made: distances between courts and the parties' residence should remain reasonable.

13.4.1.2 Jurisdiction *Ratione Materiae*

Another economic reason to regulate jurisdiction can be found in the advantages of the division of labor. By designating specialized courts, the overall level of their judgments will satisfy higher standards against lesser costs. At the same time, if needed, jurisdiction *ratione materiae* (related to the legal nature of the claim) can be accompanied by special procedural provisions to enable these courts to conduct proceedings more suited to the kind of cases they have to handle.

Jurisdiction *ratione materiae* could also be a matter of "internal separation of powers" within the court system. It is probably better not to mix appeal courts with first instance courts to safeguard the professional distance that is needed to judge impartially about a claim to review a decision of colleagues in another court. It is common usage to refer to these relations between courts as those between "higher" and "lower" courts, but this is, after all, merely a figure of speech.

13.4.1.3 National Jurisdiction

A fundamental jurisdiction problem is at stake when determining the scope of the powers of all courts in a national court system taken together. This national jurisdiction gives an answer to the question which legal issues can be decided by the national courts at all. For example, if a French citizen is killed by an Australian in Argentina, could this crime be tried by the Criminal Court of Singapore where the perpetrator has been arrested when he came off the airplane? And in the case of two women who married in Belgium, can they get their divorce in a Japanese court? These are all questions of national jurisdiction that can be solved at a national level but are also, in many instances, the subject matter of bi- or multilateral treaties or international regulations.

Recognition National jurisdiction is a very sensitive matter since states could refuse to accept each other's views on these questions. That explains why there is a national and an international aspect to it. The national legislature can determine the jurisdiction of its own courts but is limited in its possibilities by international law.

> In the European Union for instance, many jurisdiction issues have been settled in EU-regulations.

And if there is a free margin of appreciation, states do not always accept the way this margin has been used by the courts of another state, stipulating special conditions for the recognition of foreign judgments. The possibility of enforcement of foreign judgments thus depends on the recognition of these judgments by the national authorities, of course within the framework of the numerous bi- and multilateral treaties that have been concluded regarding this matter.

13.4.2 Standing

Procedural law imposes restrictions on the possibility to appear in court. Some entities, although existing in some way or another, are not recognized by law as entities with the possibility to start proceedings as a claimant or being summoned into court as a defendant. Some entities, we say, do not have legal standing: they do not qualify as a *persona legitima standi in iudicio*; they do not have a *locus standi*. Animals are a good example. The issue of standing can also depend on the particulars of the case. Generally speaking, a natural person has legal standing,

but sometimes he will lack an interest that is sufficient to commence proceedings. All these questions are covered by what is called the "doctrine of legal standing."

Standing in administrative law is discussed more extensively in Sect. 9.6.

Using the word "entity" is unavoidable since lacking standing sometimes implies that we have to do with something rather vague. A neighborhood committee organizing a fancy fair is a good example. Persons working together coordinate their actions, but for most jurisdictions this does not create shared liabilities or entitlements. The committee will not have legal standing, but the distinct members of the committee have.

On the other hand, jurisdictions might extend the concept of standing—normally reserved for natural and legal persons—to some forms of cooperation. Interest groups and commercial activities can thus be allowed to start proceedings (or have proceedings started against them).

Point d'interêt, point d'action Standing may also depend on the subject matter of the case. He who does not have an interest that is recognized by law will not be allowed to commence proceedings. To express this, often the French adage is used: *Point d'íntérêt, point d'áction.*

Thus in principle it will not be possible to lodge a claim against someone to make him pay his debts to a third party.

Trifling Claims Another instance of this rule is related to trifling claims. If the amount of money at stake is too low, the court will not admit the claim. As the Romans said: *De minimis non curat praetor* (the court does not deal with trifling claims).

13.4.3 Representation by a Lawyer

Procedural and substantive laws can be difficult, which can already be seen from the fact that law is an academic discipline. Allowing parties to conduct proceedings themselves could do much harm to their own interests (missing all the arguments any lawyer would put forward) and to the administration of justice (since much time will have to be spent reacting to pointless motions and elucidating what the layman could have meant with his assertions and claims).

Every jurisdiction will draw a line and will make legal representation at some point obligatory for parties who want to appear in court. Where the line is drawn depends on many factors. One could be the complexity of the procedure, for which reason in as good as every jurisdiction legal representation before the highest court is obligatory. Another factor can be found in the interests at stake.

> Legal representation is often monopolized by recognized specialists. This recognition can take the form of providing facilities (access to files, the right to plead, the right to represent clients without proof of power of attorney), but in most countries the profession is completely regulated and protected by excluding all others from defending clients in court (or even giving legal advice out of court, like in Germany, Italy and Greece). This has created vast monopolies of professional groups of lawyers. Their names and titles are well known, like the *barristers* and *solicitors* in common law countries, the *avocats*, *avoué s* and *procureurs* in France and the *abogadi* and *procuradores* in Spanish speaking countries. They are united in associations with names like the Law Society or the Bar Association. Their existence and proper functioning is of mutual benefit to (the administration of) justice, to the public and to themselves, because specialization costs money and thus has to be paid for.

The public interest involved in the existence of a capable and competent legal profession has given it a very strong position. In the European Union, for instance, the rules of free competition do not apply to the legal profession as long as it can be assumed that fixed or minimum prices for its services serve the interest of quality. At the same time, the monopoly granted to the profession left it with a strong dependency on choices made by the legislature regarding legal representation. Thus, the profession will always be strongly opposed to any liberalization of the rules on obligatory legal representation.

13.4.4 Commencement of Proceedings

In all jurisdictions, special attention is paid to the way proceedings can be started. As noted above, the commencement of proceedings is closely linked to fundamental principles of the administration of justice. The way proceedings have to be started determines the scope of the right of access to justice and should also guarantee that the court will listen to both sides, ensuring that the other party (which could also be the accused in criminal proceedings) will somehow get to know what has been submitted to the court.

13.4.4.1 Document Initiating the Procedure

The first document to commence proceedings is usually highly regulated. In every procedural code, detailed rules will be found with regard to the names of the parties, the grounds of the claim, and the claim itself. That is understandable since the scope of the proceedings will at least initially be determined by this document.

The precise contents of these rules depend on the way proceedings have been shaped. A standard scenario of "claim-defense-oral hearing" will require more detailed grounds than a procedure in which a written reaction to the defense is foreseen. In addition, sometimes formalities have to be observed, like using the right form, sealed paper, and the like.

Fact and Notice Pleading The first document will have to state the facts of the case and the claim of the plaintiff. Jurisdictions will only differ in the required preciseness of this factual statement. The extensive way of providing a basis for a

claim is called "fact pleading." When factual details can be left out (like in the United States), the term "notice pleading" is used.

Ius curia novit In addition, mentioning the rules of law on which the claim is based could also be one of the requirements. This might be useful for the defendant or accused since the law is not always clear and could be hard to find. If such a regulation exists, it will certainly not be meant to inform the court about the legal basis of the claim or prosecution. *Ius curia novit*—the court knows the law—is an adage that will almost universally apply. Parties can give their opinion on the law, but the ultimate decisions about its contents will always rest with the court.

13.4.4.2 Additional Issues

Informing the Defendant or Accused Ensuring that the defendant or accused will be informed about the commencement of proceedings is another matter that has to be regulated. The systems followed are diverse. Sometimes this is seen as incumbent on the claimant, who will have to make use of the means of convocation prescribed or facilitated by the law (like recommended letters, electronic summons, summons served by a bailiff or police officers). Another solution is to task state organs with informing the defendant or accused in time.

Court Fees Commencing proceedings can be subject to additional requirements, like paying court fees. Some jurisdictions feel that civil justice has to be paid for by the claimant (the polluter pays). England, for instance, is aiming at a court fee system that will cover all court costs. Some countries even claim a court fee from the defendant, although that is an exception (the Netherlands, Scotland).

At the other end of the spectrum, justice is seen as a fundamental right that should be free for all in all circumstances. Thus, France and Spain do not impose any payment for commencing proceedings or filing a defense. In fact, should we not be grateful to the parties that they submit their conflicts to our courts? Without them, the law could not be developed and specified by our judges. This could provide another reason not to impose too many burdens on the parties.

13.4.5 The Ordinary Course of Proceedings

At first, this might seem a bit peculiar, but essentially all court proceedings are a journey from the law to the facts. First, a selection has to be made of the relevant rules that apply to the case at hand. In most criminal matters, the rules to be applied are pretty obvious and follow directly from the indictment, but even then, sometimes, some hard nuts have to be cracked. In civil matters, selecting the rules (or relevant case law) is sometimes rather complicated. Once the relevant rules have been established, most proceedings enter into a second stage. In that stage, the facts have to be investigated in order to verify if the rules apply or not.

13.4.5.1 Trial

In common law jurisdictions, a tricky word has been coined to indicate this second stage of investigating the facts: the trial. The word is tricky since many scholars from the civil law tradition have been tempted to use the word for every court session or oral hearing in court. They thus underestimate the connotations that underlie the term, which is heavily linked with passive judges, jury decisions, cross-examinations, battles of experts and cunning lawyers who try to bend truth to lies and lies to truth. It is better to set the term "trial" aside for this kind of events.

13.4.5.2 Pleadings

Before entering the stage of fact finding, the parties will exchange their views on the matter at hand, in most cases already handing in documentary and other evidence. Jurisdictions differ in the way this is organized. Again, rather disturbingly, this phase, normally in writing, is usually designated by the word "pleadings." The word "pleadings" has, because of its resemblance with its singular counterpart, a strong oral connotation for those coming from a civil law tradition. Still, pleadings (plural) are always in writing.

13.4.5.3 Discovery and Disclosure

In most common law jurisdictions, the phase of the pleadings is preceded or accompanied by requests for information directed towards the other party. In the United States, this procedure is known as "discovery." It is characterized by drastic powers attributed to the parties' attorneys, who may for instance subpoena (summon) witnesses to their office to subject them to an oral examination.

In England, the term "disclosure" is used. Disclosure is not as party controlled as discovery, although parties can be forced to release information that is not advantageous for their own case.

In civil law jurisdictions, fact finding by the parties is, as a rule, not part of the standard proceedings but can be achieved by following separate procedures leading to interim orders of the court.

13.4.5.4 Funnel Model

When the pleadings are over, the court comes in to decide on the law (selecting the rules) and to see what factual matters still have to be decided. Usually, the court's decision is laid down in a written interim judgment.

If no factual matters remain (either because there is no course of action or because all defenses have to be rejected), a final judgment puts an end to the case. Otherwise, "the case is sent to trial," i.e. a factual investigation is ordered.

Civil law jurisdictions use a funnel model to make the transition from the legal stage to the factual stage. All alleged facts are filtered by the court, which will expressly state which facts have to be proven *and* what means of proof is to be used. The costs of fact finding can thus be limited in a significant way.

13.4.5.5 Juries

When fact finding is over, the decision about the facts that indeed have been established has to be made. Some jurisdictions think it is best to leave this decision (at least in certain cases) to a jury, i.e. an assembly of laymen, selected from the population at large. The reasons put forward are twofold: firstly, the layman knows what a fact is when he spots one and is not obfuscated by legal reasoning and, secondly, justice should be as democratic as possible. Doubts regarding the efficiency of jury trials and the correctness of their outcomes pushed most jurisdictions in the direction of totally abolishing them or at least minimizing the participation of laymen in the administration of justice.

13.4.6 Law of Evidence

Material and Formal Truth Fact finding and deciding on matters of fact are not the same. The rules of evidence are in between. Every jurisdiction regulates, in one way or another, how facts can be proven. Fact finding is always a pursuit of the material truth (i.e., the real state of affairs), but since we can never be sure of what exactly happened in the past, the laws of evidence try to establish standards to exclude uncertainties that are not acceptable in the eyes of the law. In the end, the outcome is the formal, procedural truth that may not coincide with the material truth.

13.4.6.1 Evidence and Trial

A first category of rules regarding evidence is closely linked to the concept of a fair trial, even at the price of giving up the material truth for higher values. Torturing witnesses or the accused to get the truth out of them could be very effective, but most jurisdictions do not regard this as a valid method of getting evidence. Searches of premises are limited to specified circumstances, and even the way witnesses are examined can be restricted. Exclusion of evidence could be the consequence, although other remedies are used in practice (like reduction of the sentence).

13.4.6.2 Privileges

Related to this, the law of evidence in many jurisdictions is respectful of the duty of professional secrecy of, for instance, doctors and lawyers. To serve their customers, confidentiality is essential for doctors and lawyers. Patients and clients have to be sure that all information given to their doctor or lawyer is strictly confidential and will not be revealed to anyone else. As a counterpart, the information obtained is sometimes privileged and cannot be revealed in court. Where the line is drawn is different for each jurisdiction.

13.4.6.3 Means of Evidence

The law of evidence may also limit the means of evidence that are allowed in court. In particular, new technologies are sometimes regarded with distrust.

There are still jurisdictions in which photographs and digital media can only be introduced by using detours like an expert's or witness's statement.

In fact, the traditional list of acceptable means of evidence only contains witnesses, experts, documents, confessions, and the court's observations. In the French tradition, this can be supplemented by presumptions of fact, inferences made by the court based on undisputed or established facts.

13.4.6.4 Value of Evidence

Evidence is rarely completely reliable, and in most cases some extra considerations are needed to choose between the possibilities offered by all means of evidence presented in court.

Free Evidence The doctrine of free evidence leaves the appreciation of all means of evidence to the court. The court will have to base its decision about the evidence on the scenarios presented by the parties (or the prosecution and the evidence) and the likelihood of each of these scenarios in the light of the evidence that has been produced. The less this appreciation is trusted, the more the judge is curtailed by rules telling him which evidence to discard and which evidence to believe.

One Witness A rule found in many jurisdictions is the *unus testis nullus testis* rule, stating that nothing can be proven with only the testimony of one witness.

Probative Evidence On the other hand, some types of documentary evidence, like deeds written by notaries, often have an imperative probative value.

13.4.6.5 Standards of Assessment

Evidence in law is not like evidence in mathematics. Proof in law is a matter of excluding other possibilities beyond a certain point, being fully aware that complete certainty about events in the past can never be obtained. Courts therefore developed criteria to set the required level of certainty.

In criminal cases, it is often said that the facts have to be proven "beyond reasonable doubt." That is a high standard, excluding the possibility of a not so exceptional explanation for the same facts other than that the suspect committed the crime.

In civil litigation, the standard of proof is usually the preponderance of the evidence, simply meaning that one party has more proof for its statements than the other party.

13.4.6.6 Burden of Proof

Fact finding may be structured when a "burden of proof" model is used. In civil law countries, the rules of evidence indicate which of the parties will have to prove certain statements.

Usually, the claimant has to prove all disputed statements on which his claim is based, while the disputed facts underpinning the defendant's defense have to be proven by the defendant.

This *onus probandi* is decisive of the outcome of the case. If a party with the burden of proof fails to come up with sufficient evidence, his claim or defense is rejected. The burden of proof can be shifted to the other party in special circumstances when this would be fairer.

The rule *negativa non sunt probanda* (negative statements do not have to be proven) could for instance imply that the other party has to prove the positive counterpart.

13.4.7 The Role of the Court and the Parties in Litigation

Both in civil, administrative, and criminal cases, there has to be a certain division of labor between the court and the parties to bring proceedings to an end. Each of them has its specific interests, roles, tasks, and responsibilities, which sometimes coincide but could also be opposed to each other. Directing one's eye towards the court, two different characterizations could be used, corresponding with different approaches: the court as a referee and the court as a manager–investigator. These approaches will be described by examining the distinction between accusatorial and inquisitorial procedures and by exploring the concept of "case management."

13.4.7.1 Adversarial and Inquisitorial Procedures

Inquisitorial System A major distinction between types of procedure is between inquisitorial and adversarial systems. In an inquisitorial system, the main roles are for the judge and, in criminal cases, the public prosecution. They have the responsibility to find out whether a crime has been committed and who did it and to get a criminal conviction. It is also their responsibility to avoid punishing innocent persons. The suspect and his counsel play a lesser role in the proceedings.

In civil cases, the judge in an inquisitorial system conducts the fact finding himself, questions witnesses, issues orders to the parties and experts, and could even go beyond the claims of the claimant or beyond the defenses of the defendant if he considers this just.

Adversarial System In an adversarial system in criminal cases, the public prosecutor and the suspect have (relatively) equal standing. In a sense, each side participates in a contest, with the conviction of the suspect at stake. The judge has to make sure that the contest is fought according to the rules, and the judge or the jury will determine who has won the contest.

In civil cases, the judge is only a referee, leaving the procedure to the parties. The claimant determines what the proceedings will be about and the scope or contents of each party's defense will not be altered by the court, not even if a strong defense is missed.

It should be emphasized that neither the inquisitorial nor the adversarial system in their pure forms are to be found anywhere. All systems are mixed systems, although the emphasis in the common law tradition used to be more on the adversarial side and in the civil law tradition more on the inquisitorial side. However, this difference in emphasis is gradually becoming less pronounced as civil law countries borrow adversarial procedures (like greater powers for defense counsel and defendant), and the common law countries borrow inquisitorial procedures (cases only decided by judges).

13.4.7.2 Case Management

Especially in a more or less adversarial civil context, proceedings can last a long time. The court does not take initiatives and just waits until the parties decide to move on. In recent years, this made the call for a form of "case management" by the courts stronger and stronger.

Recognizing that a less reactive and more active judge could save time and money for both the parties and the state, in many jurisdictions, inquisitorial elements have been introduced into proceedings before the courts. The problem is always finding the right balance between the rights and autonomy of the parties and the powers of the judge.

> In England for instance, much attention is paid to the preparatory phase of proceedings, forcing the parties to explore out-of-court solutions and to submit a file to the court that is already complete. In France, a special judge (*juge de la mise en état*) has been created to supervise civil proceedings.

What is meant by "case management" is therefore rather diverse. However, the core of this notion reflects the insight that adversarial elements in proceedings may be sacrificed for the sake of efficiency.

13.4.8 Legal Remedies

Even in proceedings before the courts, mistakes can easily be made. Those mistakes could concern the law, as well as the facts, and can be made by the court, as well as the parties. The resulting judgment will not reflect the "real" legal situation, and that is generally felt to be highly unjust. Therefore, all jurisdictions provide for extra procedures to have these erroneous judgments overturned, although not in all cases.

The extra procedures are labeled "legal remedies." They come in an incredible variety of forms. The variety concerns the procedure to follow, the court or instance that has to be applied to, the (legal or natural) person the legal remedy is created for, the time limits to be observed, the relief that can be obtained, and the standards to be applied by the court.

13.4.8.1 Appeal

Appeals can be dealt with in two different ways, either as a review of the first instance decision or as a new appraisal of everything the parties have submitted (*novum iudicium*, full appeal). If the appeal is a *revisio prioris instantiae* (review), the case will be remitted to the court of first instance if any mistake is found in the appeal.

This can be time consuming, with cases going up and down the court system without reaching a final judgment. Therefore, many jurisdictions treat the appeal as "devolving," meaning that the entire case is submitted to the appeal court, which will give a final judgment itself.

13.4.8.2 Cassation

Uniformity A special legal remedy is cassation. Cassation is meant to secure the uniform interpretation of the law. A cassation court will therefore be devoid of investigative powers and has to accept the facts as they have been established by the lower courts. This court will decide on matters of law only. Since uniformity is the ultimate aim, logically not more than one cassation court can be created within a single jurisdiction.

> Especially countries in the French civil law tradition will have a cassation court. Among them are France (*Cour de Cassation)*, the Netherlands (*Hoge Raad*), Belgium (*Verbrekingshof*) and Italy (*Corte di Cassazione*). Other highest courts like the Supreme Court of the United States are not cassation courts, although any fact-finding by these courts will be extremely exceptional.

Conclusion

The brief overview of elements of procedural law showed an enormous variety in the way litigation can be shaped in different jurisdictions. Nevertheless, the margins are set by the principles discussed in the first sections, which have the objective to ensure that cases will be dealt with in a fair way. This is a guarantee for the parties that they will be proved right when their case is just.

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Philosophy of Law

14

Jaap Hage

14.1 What Is Philosophy of Law?

Otherwise than, for instance, private law, constitutional law, or criminal law, philosophy of law does not deal with a particular subfield of law. Philosophy of law is a branch of philosophy and, more in particular, the branch that deals with philosophical questions about law. Examples of such questions are as follows:

- how punishing criminals can be justified,
- what the essence of the rule of law is,
- whether human rights would still exist if they were not included in a statute or treaty,
- why contracts are binding,
- what the nature of law is.

In this chapter, it will not be possible to discuss all legal philosophical questions. We opted for the last question that may be the most fundamental one: what is law's nature? Philosophers of law have discussed this question for centuries, and apparently they still disagree. This disagreement is partly caused by the fact that the question is ambiguous and can be asked with different purposes in mind.

The Normative Question The question about law's nature is often asked in the context of a decision-making procedure. For instance, a judge asks herself how a particular case is to be decided. She wants to apply the law, and the question after law's nature is a step towards the solution for the case at hand.

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Riggs v. Palmer, 115 N.Y. 506 (1889)

Francis Palmer made a last will in 1880 in which he left most of his large estate to his grandson Elmer Palmer. Elmer knew this, and was afraid that his grandfather might change his will. To preclude this possibility, Elmer poisoned his grandfather. Mrs. Riggs, the daughter of Francis Palmer, sought for this reason to invalidate the last will.

New York State law at that moment did not contain any written provisions to deal with such cases, and the question that was raised by this case was whether the rule that a convicted murderer cannot inherit from his victim was nevertheless part of the law.

The New York Court of Appeals decided that Elmer could not inherit from his grandfather, and invoked the principle that nobody should profit from his own wrongs. Implicitly it also adopted the view that such unwritten principles are part of the law, which is a view about law's nature.

If the question after law's nature is raised in the context of a decision-making procedure, it is a normative question. It addresses the issue what is to be done, and the underlying assumption is that the law determines what is to be done. For instance, a judge should apply the law, but not morality, and therefore it is important to know which rules count as *legal* rules.

The Conceptual Question It is also possible to inquire after law's nature out of a more theoretical interest. Philosophers are sometimes interested in questions without immediate practical interests. They may want to know the nature of law and how legal norms differ from customs and moral norms, purely to have more insight. From this perspective, the question after law's nature is completely disconnected from the question how to act. It is then well possible to say "This is prohibited by law, but that does not at all affect what I will do."

The conceptual question aims at insight into law's nature but not at answering the question what is to be done. An important part of the confusion in the discussion about law's nature can be explained by the fact that people ask the question from one perspective and receive an answer from the other perspective.

Overview In the remainder of this chapter, we will discuss law's nature in some detail. In Sects. 14.2 and 14.3, we address the conceptual approach, while the normative approach is the central topic of Sects. 14.5 and 14.6.

14.2 Hart: Law as System

14.2.1 Introduction

Whoever asks a modern lawyer what law is will most likely receive an answer along the line that law consists of rules that are made and enforced by the state. Moreover, this lawyer will consider his answer to be a purely factual observation. *As a matter of fact*, law consists of those rules that have been made, or at least are enforced, by the state.

14.2.1.1 The Concept of Law

This view on the law has been elaborated by the English philosopher of law Herbert Hart (1907–1993). His main book was *The Concept of Law*, and we will focus on that work.

> To make the exposition easier to follow we will simplify Hart's views somewhat, sometimes at the cost of a little distortion of Hart's sophisticated ideas.

The title of Hart's book is indicative for the question addressed in it. Hart is not interested in the contents of the law of a particular jurisdiction but in the characteristics of law in general. That is why he writes about the *concept* and not about the content of law.

Moreover, Hart approaches law as a social phenomenon. He considers his work to be a study in descriptive sociology. It may be disputed whether Hart's characterization of his own work is correct, but that does not subtract from Hart's intention. This intention is to study the law as a social phenomenon in order to identify the general characteristics of this phenomenon.

14.2.1.2 Primary and Secondary Rules

One of the findings of Hart is that the law does not solely consist of rules that prescribe behavior. In this connection, Hart introduces the distinction between primary and secondary legal rules. Primary rules aim to guide behavior. They include rules that prohibit theft, tell us to drive on the right hand side of the road, or to compensate the damage that results from contractual default.

Next to primary rules, the law also contains secondary rules. These rules do not prescribe behavior but have as their function to organize the legal system itself. In this connection, one may think of rules that point out the organs of state and their competences, rules that specify which of two conflicting rules has precedence, and rules that govern legal procedures.

For our present purposes, one particular category of secondary rules is most important, that is, the category of rules that indicates which other rules count as law. Indeed, one of the most important conclusions of Hart's theory is that the law itself determines which rules are legal rules and which rules are not. The law does so mainly by pointing out who has the power to make legal rules.

The underlying idea is that most law has been laid down. There are many bodies that can create law, on the level of the EU, states that make treaties, national legislators, including in common law countries the judiciary, subnational legislators on the level of provinces and municipalities, and, on the bottom level, private persons who create laws for themselves in the shape of contracts or last wills. All these law creators succeed in making law because and to the extent that they were empowered to do so. They received this power from legal rules, and in that way the law itself determines what counts as valid law.

14.2.1.3 A Fallible Theory

Two comments must be made to the above characterization of valid law as law that has been made by a law creator empowered by the law itself. The first comment is

that this characterization is a purely factual statement, which is in principle amenable to falsification. Hart did not claim that competently created rules deserve to count as legal rules or to be obeyed. The only thing he claims is that modern legal systems in fact identify legal rules by means of the criterion whether these rules were created by somebody who had the legal competence to do so. Whether that is good or bad is a different issue, an issue moreover that lies beyond the problem field that Hart wants to cover. Hart is—in *The Concept of Law*—concerned not with the question what we should do or which rules ought to be obeyed but only with giving an adequate characterization of law. His presupposition is that such an adequate characterization can be given by having only eye for social practices and without dealing with normative issues.

14.2.1.4 A Chain of Rules

The second comment is that valid legal rules are identified at the hand of powers that were themselves conferred by *valid legal rules*. In other words, the rules that assign the powers required for making valid law must belong to the law themselves. This means that these power conferring rules must have been made by persons or bodies who were assigned the power to do so by power conferring rules that must themselves be valid legal rules, meaning that these latter rules . . . etc.

Let us consider an example to see what this means in practice. Suppose that the Dutch city of Maastricht has a parking regulation, especially for the market place. This regulation is valid law, let us assume, because it has been created by the Mayor and Aldermen of Maastricht. This body received the power to make parking regulations for particular streets and squares from a local bylaw on parking. This bylaw was created by the municipality council of Maastricht, which received the power to make such bylaws from a statute created by the Dutch parliament and government. Parliament and government received their power to do so from the Dutch constitution (see also Fig. 2.1).

The same chain of rules can also be followed top-down. Many statutory rules are created on the basis of a power conferred by the constitution. These rules include both a rule on the organization of municipalities and a rule about contract formation. The parking regulation of Maastricht ultimately derives from the rule about the organization of municipalities. A contractual rule about the time at which some good must be delivered derives from the rule on contract formation. The "tree" of rules deriving from the constitution is very complicated, but, as we will see, Hart's view is that in the end all rules have the same foundation.

14.2.2 Social Practice as Foundation of Law

14.2.2.1 The Chain of Validity

So we have a chain of validity in which rules and powers alternate: a valid rule was created on the basis of a power to create rules, and this power was assigned by a valid rule that was created on the basis of a power . . . etc. This last "etc." signals a complication, however. The chain ends with the constitution. Arguably, this

constitution was created by a legislative body, including the judiciary, which derived its power to change the constitution from the previous constitution, which was created by … In case of a written constitution, the chain can be traced back from the present constitution to the first constitution, but there it must stop. By definition, there is nothing before the first constitution. Why is the first constitution valid law then?

According to Hart, the validity of the first constitution would be based on *recognition* of this first constitution and of all the law that follows from it as valid law. Since the first constitution and what follows from it is recognized as valid law, it *is* valid law.

14.2.2.2 The Role of "Officials"

Against this view of Hart it might be objected that most people are not even aware that the first constitution has ever existed, let alone that they recognize it as valid law. Hart's rebuttal of this objection is that it is not the recognition by "ordinary" people that counts but the recognition by the "officials" of the legal system. Among these "officials". Judges and other legal decision makers take a prominent place. If these officials recognize the first constitution and everything that follows from it as valid law, then this first constitution and what was directly or indirectly created on the basis of it counted and—if it still exists—counts as valid law.

Obviously, this raises the question why the "officials" are officials with such an important role. The only acceptable answer in the vein of Hart seems to be that the officials can play this role because they are recognized as having this role in social life.

This last answer makes clear why Hart could describe his project as a study in descriptive sociology. It is social practice, with the citizens who recognize the officials and the officials who recognize the first constitution and what follows from it as valid law, that determines what law is.

14.2.2.3 A Practical Application: EU Law

What are the practical implications of the view that, in last instance, social practice determines what law is? This is illustrated by the difference of opinion between the Court of Justice of the European Union and the German Constitutional Court (*Bundesverfassungsgericht*) about the question why the law of the European Union directly applies to the citizens of the EU member states. According to the Court of Justice, this question is governed by EU law; according to the German Constitutional Court, German law, and in particular the German constitution, governs this issue. As it happens, EU law as interpreted by the Court of Justice is in agreement with the German constitution as interpreted by the German Constitutional Court, so no actual problems arise. But that would become different as soon as the German Constitutional Court declares a European rule invalid because it conflicts with the German constitution. Because in that case, the European rule would be valid according to the EU and all Member States that assign the highest authority to the European Court of Justice, while the same rule would be invalid in the eyes of the German Constitutional Court and the German judges who will, most

likely, follow the Constitutional Court on this issue. According to Hart, this issue would in last instance be decided by social practice. If the practice is not uniform within the EU, the law will not be uniform within the EU, not even if the law was created by the EU itself.

14.2.2.4 Another Application: Customary Law

In Hart's view, as rendered above, the law consists of rules that were created by competent legislators, including courts. All law would be created in this way. On this view, there would be no room left for customary law because a defining characteristic of customary law is that it was *not* created.

However, it is not Hart's theory that determines what is law but—according to this same theory—social practice. If the social practice is that some rules that were not explicitly created nevertheless are recognized as being legal rules, then these recognized rules *are* legal rules.

Then there are two kinds of legal rules: in the first place, rules that count as valid law because they were created by competent legislators and, in the second place, rules that are valid law because they are recognized by the "officials" as valid law.

14.2.3 Hart as a Legal Positivist

14.2.3.1 Positive Law

Positive law is law that exists as a social phenomenon. Two variants of positive law can be distinguished, namely positive law in a wider and in a more narrow sense. In its narrower sense, positive law is law that has been created, laid down (*positus*) as the decision of a competent legislator. In the European continent, this will often be the formal legislator, the legislative body on the level of states in which national parliaments play an important role. Or it will be a cooperation of states, in the case of treaties; the European Union, in the case of European regulations and directives; or a legislator on a decentralized level, such as the council of a municipality. In common law countries, also the judiciary is competent to lay down law.

Positive law in the wider sense not only includes positive law that has been laid down but also includes law that exists merely because it is recognized as such. That includes customary law, case law in the countries where *stare decisis* does not apply, and arguably also soft law to the extent that officials take it into account in their decision making.

14.2.3.2 Legal Positivism

Legal positivism is the view that law coincides with positive law: all positive laws are valid law, and there is no valid law outside positive law.

> Theoretically one might distinguish between legal positivism in a wide and in a narrow sense, corresponding to the wide and narrow version of positive law.

It is not hard to see why Hart's views about the nature of law make him into a legal positivist. According to Hart, legal rules were either laid down by a competent

legislator (which includes the judiciary in common law countries), and in that case they belong to positive law in the narrow sense. Or rules belong to the law because they are recognized as legal rules in social practice, by the "officials", and then they belong to positive law in the wider sense. Apart from these two variants of positive law, there is no law according to Hart, because law is by definition founded on social reality.

14.2.3.3 The Separation of Law and Morality

If law is a social phenomenon, it only depends on social reality what the content of the law is. Usually, the content will be determined by legislation. Whether a thus created rule is morally just or whether it is prudent to live in accordance with such a rule is, from the perspective of legal positivism, not relevant for the question whether the rule is a legal rule. This does not mean that morality and reason have no influence on the contents of the law; they have. But this influence is, according to Hart, that morality and reason influence the content of the sources of law, in particular of legislation and case law. Whether a rule is a legal rule is not determined by whether the rule is just or prudent but by whether the rule was created by means of legislation or could be found in a judicial decision.

According to legal positivists, there can be unjust and imprudent law. In the words of the nineteenth century legal positivist John Austin:

> The existence of law is one thing; its merit or demerit another.

If the issue whether a rule is valid law does not depend on whether the rule is just or prudent, if law is "merely" a social phenomenon, it is not obvious that legal rules should be complied with. Paraphrasing Austin, Hart might have said:

> The existence of law is one thing; the reason to comply with it another.

14.3 Dworkin's Criticism

It was Hart's intention to characterize the law as it really is, not as it should be. Did he succeed in that endeavor? Is law really, as Hart writes, a union of primary rules that guide conduct and secondary rules that regulate the law itself? Is the legal validity of rules really only determined by the pedigree of the rules and not by their content?

One of Hart's students, Dworkin, dared to doubt this. In one of his first publications, he attempted to show that Hart's theory about law's nature is wrong, even if this theory is measured against the standard Hart proposed himself, the standard that the law should be described as it actually is.

> Later on, Dworkin developed his own view of law's nature, which does not even share Hart's starting point anymore. Here we will focus on Dworkin's early work, in which he still adopted Hart's starting point.

14.3.1 An Example

In Sect. 14.1 we encountered the case of Riggs versus Palmer. The plaintiffs in that case, Mrs. Riggs and Mrs. Preston, sought to invalidate the will of their father Francis Palmer. The defendant in the case was Elmer Palmer, grandson of the testator. The will gave small legacies to two of the daughters, Mrs. Preston and Mrs. Riggs, but the bulk of the estate went to Elmer Palmer.

The reason why Mrs. Riggs and Mrs. Preston wanted to invalidate the will was that Elmer had murdered his grandfather. The grandfather had recently remarried, and Elmer feared that he would change the will. The plaintiffs argued that by allowing the will to be executed, Elmer would be profiting from his crime. While a criminal law existed to punish Elmer for the murder, there was no statute that invalidated his claim to the estate.

Legal Justification Should Elmer inherit his grandfather's estate given that he murdered his grandfather and also given the fact that there was no statute invalidating his claim to the estate? A yes or no answer to this question would be a legal judgment. Legal judgments need to be justified. In its most basic form, the justification of a legal judgment consists of an argument in which the facts of a case are *subsumed* under a rule formulation and in which the legal judgment is derived from these two premises. An example would be the following argument:

Rule:	A person cannot inherit from another person whom he murdered
Facts:	Elmer murdered his grandfather
Legal judgment:	Elmer cannot inherit from his grandfather

This justification of a legal judgment is nothing else than a logical derivation of the judgment from a rule formulation and a case description.

If the rule formulation can be read off from the available legal sources, the justification of a legal judgment is no harder than producing such a simple argument. It is *never* so easy, however, and Elmer's case provides a nice illustration why not. The rule that a person cannot inherit from another person whom he murdered could not be found in the law of New York as it was when the case appeared before the court. There was a relevant rule that was easy to find, namely the rule that if somebody was appointed as inheritor in the last will of somebody else and this other person died, the first-mentioned person inherits. This rule, which could be found in the available sources, was not the rule that the court applied, however. The court applied the rule mentioned in the primary justification, and this rule could not be found in any source. How did the court arrive at this "new" rule?

Justification of the Rule Here is where another aspect of justification comes into play. The court produced an argument with a conclusion that the rule that a person cannot inherit from another person whom he murdered is a valid rule of

New York law. This was not an obvious argument, as we will see later. However, even if the court would have adopted the obvious rule according to which Elmer would inherit, the court should have justified the use of this rule.

14.3.2 Hard Cases, Gaps, and Discretion

According to legal positivists such as Hart, the law is a social phenomenon. The law consists of rules, and these rules exist as a matter of fact in social reality because they were created by a person who, or an institution that, was empowered to do so.

Moreover, the rules attach legal consequences to cases. These legal consequences are just as "objective" as the rules themselves. Legal "decision making" is not really a form of decision making; it is establishing which consequences the legal rules already have attached to the case at hand.

> For example, if somebody negligently causes a car accident, this person must compensate the damage. This obligation to pay damages does not depend on the judgment of a court. It comes into existence at the moment the accident took place.
>
> If the case nevertheless comes before a judge, it is in the positivist picture of law the duty of the judge to establish what was already the case, namely that the tortfeasor has to compensate the damage. The court's judgment is not necessary to *create* the obligation to pay damages; it is only needed *to make enforcement of this obligation possible*.

Gaps Just like other phenomena in social reality, the law is finite. There are no more legal rules than were explicitly created by means of legislation or judicial decision making. As a consequence, there may be cases that lack an applicable legal rule. The law has no solution for these cases; it then contains a *gap*.

Hard Cases If a judge nevertheless has to take a decision, he must by necessity create new law. In taking this decision, he may take all kinds of things into account, such as governmental policies, the demands of morality, or even his personal preferences. There is one thing on which he cannot base his decision, however, and that is the law. He cannot do this because for the case at hand there just is no law. Such cases, where there is no law or where the law is hard to discover, are called "hard cases."

> Elmer's case may have been such a hard case. Although New York law contained rules for standard cases of inheritance and last wills, it did not yet contain a rule that deals with murderers who threaten to inherit from the person they murdered.

Discretion If a legal gap occurs, the legal decision maker must exercise discretion in the sense of making an unbound decision. Unbound by the law that is, because the decision maker may feel bound by other standards, such as morality. However, it is not the law that prescribes him to take morality into account because *ex hypothesi* there is no law available.

> Arguably, as soon as a court has taken a decision, there is law for hard cases. First there is law for the concrete case at hand, because the court had the power to create legal consequences for this particular case. And second, there is law for similar new cases, because the court decision can function as a precedent. This means that a type of case that used to be hard, may become easy after a court decision.

14.3.3 The Donut Theory of Law

The above account of hard cases in which the law, being finite, contains a gap and in which courts must exercise discretion because there is no applicable law was offered by Ronald Dworkin. Dworkin called this account the "donut theory of law". A donut is an oval-shaped piece of fried dough, with an opening in its middle. See Fig. 14.1.

The donut stands metaphorically for the law. The opening in its middle symbolizes the space that the law leaves available for a judge who must decide a hard case. Judicial decision making is confined by law, but the law does not determine the decision.

The donut theory was meant to be an account of legal decision making according to legal positivism, and *it was meant to illustrate why legal positivism is wrong*.

One Right Answer According to Dworkin, legal positivism is wrong because legal decision making does not work as it should work according to legal positivism. Courts that must deal with hard cases do not take a decision that is unbound by law. They do not exercise discretion, but instead they argue as if the case at hand has one unique solution (one right answer) and as if it were their task to find that single right answer to the case. In producing these arguments, courts invoke more "law" than only the positive law, such as legal principles that were not laid down by an official legislator.

> This point can be illustrated at the hand of the case of the grandson who murdered his grandfather in order to inherit. The court which had to decide this case invoked the legal principle that nobody should profit from his own wrongs. Elmer would profit from his murder if he would inherit his grandfather's estate, and therefore he should not inherit. This principle prevails over the rule that last wills should be followed. Therefore, the court decided that Elmer would not inherit.

Legal Principles The basis for Dworkin's criticism of Hart is that legal decision makers sometimes make use of materials such as legal principles, which would in the legal positivist picture not count as law. The crucial point in Dworkin's argument is that the legal decision makers *as a matter of* fact consider these other materials as legal materials too. This means that, in their eyes, *the Hartian picture of law is wrong*. There exists more law than legal positivists would allow, and it is this law that legal decision makers invoke if they have to decide hard cases. Moreover, it is this law that makes that every case would have a single right answer.

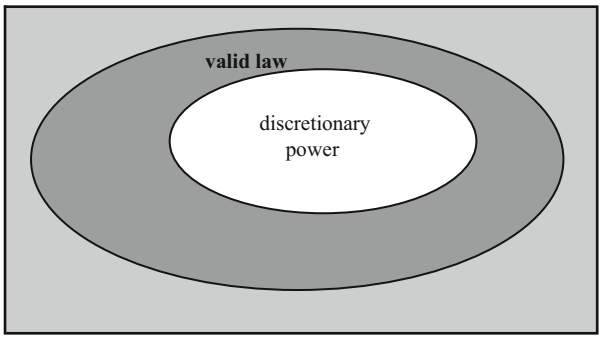

Fig. 14.1 The donut theory of law

The decision made by the New York Court of Appeals was no doubt an attractive one. But why is it problematic for legal positivists such as Hart? It is because, Dworkin writes, legal principles such as the principle that nobody should profit from his own wrongs are not recognized as part of the law by the legal rules that define the law. The principle does not have the relevant source. In fact, it has no "source" at all because it was not made. And still, as a matter of fact, this principle is part of law. Dworkin uses Hart's approach to determine law's nature, namely looking at social reality, and more in particular to what courts do. However, on Dworkin's view of social reality, there is more law than what can be identified by means of the check what has been created by an empowered lawmaker. Social reality contains legal principles that are not law because they were competently created but because of their "right" content.

If this argument ascribed to Dworkin is correct, it has profound implications for the nature of the law. Indeed, it implies that there is more law than positive law alone. Therefore, Dworkin's point about legal decision making has implications that reach farther than legal decision making alone. It regards the very nature of law.

14.4 Fact and Norm

Law finds itself on the borderline in between fact and norm. On one hand, law aims to answer the question what we should do. From this perspective, law is similar to morality and legal reasoning looks like determining what is the best thing to do. On the other hand, law aspires to be factual, something that is the same for everybody and that can be established objectively. From this perspective, legal reasoning is establishing the legal facts.

Reasons Arbitrary There are some who think that these two aspects of law cannot be reconciled. They emphasize the gap between fact and norm. Facts are objective, the same for everybody. But these facts do not tell us what we should do. Admittedly, facts do play a role in deciding what to do. If your house is on fire, that fact is of utmost importance for the decision whether you will leave the house. Theoretically, however, you might decide to stay in the house. Facts by themselves cannot determine what you should do; they can only do so if they are given the meaning of reasons for behavior. Whether they have that meaning is not given with the facts themselves; it is a matter of choice. Reasons are, on this view, arbitrary.

If law were purely a matter of fact, it would be an open question whether it provides us with reasons for acting. Somebody might, for instance, ask himself: "According to the law I should pay taxes, but should I really do so?" This person then treats valid law as if it were the law of a foreign country or from the far past.

In our discussion of the views of Hart we already encountered this approach to the law.

Reasons Nonarbitrary There are others who think that facts, including facts concerning law, can by themselves provide us with reasons for acting. According to them, it is not an arbitrary matter whether we assign facts the meaning of reasons for behavior. If you are wise, they argue, you *know* which meaning the facts have for you. No sane person remains in a house that is on fire unless he believes that he can extinguish the fire. It is not good for humans to suffocate in the smoke or—possibly even worse—to burn alive. Barring exceptional circumstances, it is part of human nature that persons want to stay alive, do not want to suffer pain, and in general want to be happy. For this reason, it is good for human beings, objectively good, that they want to live, to avoid pain, and to pursue happiness. Maybe there are circumstances in which this is not the case, but such circumstances are exceptional. There are things that are normally good for humans, and it would be a fallacy to use the existence of exceptions to argue that the main rule that people want to live, to avoid pain, and to pursue happiness does not hold.

This last line of thinking, which assumes that some things are objectively good and others are objectively bad, can be found in the work of, among others, Thomas Aquinas.

14.5 Thomas Aquinas: Positive Law and Natural Law

Thomas Aquinas was a Dominican priest, who lived from 1225 to 1274. In that time, continental Western Europe still had a feudal system. Local rulers, members of the higher nobility, were officially subordinates of the German Emperor or the King of France but were, for most practical purposes, independent. The law in those days was still mostly customary law. The role of legislation was limited, and its function was mostly to codify existing customs.

In these Middle Ages, Aquinas formulated a theory about law's nature that has remained influential until the present day. According to this theory, law is an ordinance of reason for the common good, made and promulgated by him who has care of the community.

14.5.1 Common Good

A first characteristic of law is that it concerns the common good and not merely the interests of individual persons. There are also guidelines for behavior that only concern the individual good. A modern example is the guidelines for living in a healthy way, for instance eating healthy food. Since the consequences of unhealthy eating habits mostly touch the eating person himself, this is a matter of individual interest and not a topic for the law.

> One can have a different opinion on this and it is very well thinkable nowadays that a state introduces a tax on fat food. (As a matter of fact, Denmark briefly had such a tax.) This does not show that Aquinas' distinction does not cut ice, but rather that nowadays almost everything touches the interests of others and thereby becomes an issue concerning the common good.

14.5.2 Law and Reason

A second characteristic of law is, according to Aquinas, that law is an ordinance of reason. The content of the law is determined by reason (in Latin, *ratio*), and therefore the law can be known by reasoning about the best way to organize human society. We will refer to this kind of law as *rationalist law*.

> This view on how law can be known should be contrasted to the modern view, according to which the law can be known by studying and interpreting authoritative texts, such as legislation and case law.

14.5.2.1 Natural Law

For many centuries, the view that law can be established by means of reason went in the form of a belief in natural law. Natural law theory assumes that there is a kind of law, *natural law*, the contents of which can be derived by means of reasoning from human nature. Perhaps the most important representative of this view was Thomas Aquinas.

Human Nature According to Aquinas, human nature determines what the best way is to organize society. Following the Greek philosopher Aristotle (384–322 BC), Aquinas assumed that there is such a thing as human nature and that this nature determines what the best way is to live for a human being. Since human beings are social by nature, the best way to live is in a society with other human beings. Such a

society should allow human beings to flourish, and consequently human nature also determines what a good society is. The law that governs such a society should be based on human nature, and given this link with human nature, it is called *natural law*.

> As we have already seen, Aquinas held the opinion that the content of this natural law can in principle be established by human reason. The modern counterpart of this view would be that this is a matter of science.

14.5.2.2 Alternatives for Reason

This rationalist foundation of law can be contrasted with two alternatives, custom and will. Both alternatives assume that law exists purely as a matter of fact.

Customary Law In the time of Aquinas, most law was still customary law, rules that were generally accepted and often assumed to have existed for times immemorial. Customary law and rationalist law have in common the fact that they both see law as independent of the will of the reigning monarch. An important difference between the two is that customary law is in a sense arbitrary. Its content might just as well have been different from what it actually is, and at different times and in different places customary law is different. Rationalist law, on the contrary, tends everywhere and always to be the same unless different circumstances make different things rational.

> This last clause should be taken seriously. Even if human nature is always and everywhere the same, the circumstances under which human beings must live vary considerably with time and place. This would imply that even if the most abstract principles of natural law are universal, its concrete elaborations would still exhibit important differences.

Sovereign's Will The other alternative for rationalist law is law that has been made by the sovereign, and the content of which is determined by what happened to be the sovereign's will. This sovereign would, in the time of Aquinas, have been an emperor, king, or a member of the higher nobility. Nowadays, the people are often taken to be the sovereign. But whoever the sovereign may be, the view of the law is the same: the law corresponds to the will of the sovereign, and the content of the law is in that sense arbitrary.

Aquinas explicitly considers this alternative for his rationalist view of law. He recognizes that the will is one the factors that determine what we should do. Reason tells us how we can reach our goals; the will determines what our goals will be. But, writes Aquinas, if the will is to have the authority of law, it must be rational. Only then is the will of the sovereign the law. If the will was not rational, it is not law but an evil.

> Suppose you are walking in a forest, and have become thirsty. You would like to drink something and you know that there is a brook in the neighborhood with potable water. Then it is rational to walk to the brook and to drink some water. This example illustrates that what

you should do depends on both what your goal is (to drink) and on reason, which tells you how you can reach your goal (go to the brook).

But how can the will be irrational? The following adaptation of the example can show this. Suppose that you know that the brook's water has been polluted and is not potable. But your thirst is so big that you want to drink the water nevertheless. Should you then drink water from the brook? You should not, because in this version of the example your will is not rational.

Reason as Standard In a rationalist view on how to act and on the content of law, like the view of Aquinas, reason is not only a tool to find the means to reach a pregiven goal but also a standard to evaluate goals with. An unreasonable will should not guide our actions.

Already during the Middle Ages, Aquinas' views on this subject were controversial. More in particular, there was a discussion whether law was the manifestation of God's will. In that age, nobody disputed that the natural law was commanded by God, but the discussion was on the issue to what extent God was autonomous in commanding natural law. One view, defended by Aquinas, was rationalist: reason determines what is good law, and God has prescribed this law because it is rational. So the law depends on the will of God, but this will in its turn depends on reason because God is rational.

Voluntarism The other view on the nature of law is voluntaristic (*voluntas* is Latin for will). On this view, the content of natural law depends on the will of God, and it is good *because God willed it*. In this connection, it would not matter whether God's will and the law are rational. It is this voluntaristic view of law that, in a secularized version, has gained prominence in the legal positivist account of law.

14.5.3 Positive Law

Another characteristic that Aquinas attributed to law is that law is promulgated by him who has care of the community. This third characteristic has two aspects. The first aspect is that the person who has the power to make laws is the one who has the care for the community as a whole.

Aquinas opposes this explicitly to the head of a family, who can only make rules for family life. Such rules are not laws, because they do not concern the common good, but only the good of the family.

The second aspect is that this person who has the care of the community has the power to make laws. According to Aquinas, human beings are social beings. No single person on his own possesses the capabilities that are necessary to lead a full human life. That is why human beings need to live together with other human

beings. Given the differences between humans and their interests, a society could easily fall apart if there were not a person who directs the society towards the general interest. So there must be a monarch who furthers the common good. The existence of a society governed by a monarch therefore fits in the natural order in which human beings partake. Such a society is not something that is outside or opposed to natural law but is rather required by natural law. In order to promote the common good, the monarch should make law, positive law.

14.5.3.1 Positive Law and Natural Law

Positive law must be in service of the common good and should therefore not conflict with natural law. This raises the question why there even should be positive law. Does natural law not suffice? The answer to this question is that natural law should be supplemented by positive law because natural law is very abstract and needs to be made concrete.

> One example would be that the natural law in principle prohibits the killing of human beings. But it does not inform us about the sanctions that should be applied to those who violate this prohibition.

Moreover, there are issues that need to be regulated, but where reason does not tell us what is the correct law because this is rather arbitrary.

> An example is the issue whether we should drive on the right or the left hand side of the road. It is reasonable that there must be a rule for this, but both solutions seem to be equally good.

Why There Must Be Positive Law In short, there is a large number of issues that need regulation, but where the content of that regulation cannot be determined by reason alone. There is a need for decision making and for positive law next to, or—even better—within the framework of, natural law. In fact, it can be determined purely on the basis of reason that there is need for positive law and therefore natural law prescribes that there must be positive law. The duty to comply with this positive law follows from the facts that human beings need to live together in a society and that such a society can only exist if it has positive law.

14.5.3.2 When Positive Law and Natural Law Conflict

In the view of Aquinas, natural law and positive law would ideally supplement each other and would together constitute a coherent set of guidelines for how humans should live in accordance with their nature. It is, however, possible that positive law and natural law conflict, and then the difficult question arises how such a conflict should be dealt with.

At first sight, the issue is easy to solve. Law has, in Aquinas' view, as a function to let human beings lead their lives in accordance with their nature. If positive law does not fulfill this function, if it is counterproductive, then it would not be law. This simple solution can be summarized by the slogan "*Positive law that conflicts with natural law is not law at all*."

After World War II the German legal philosopher Radbruch argued along this line that some of the law of the national socialists would not be real law.

Threat of Chaos Taken to its extreme, this slogan is too simple, however. If people are given the possibility to invoke natural law as reason to disobey positive law, there is a serious risk that chaos will result. Indeed, everybody who disagrees with a rule might argue that the rule is not binding because of a conflict with natural law.

Disagreement Moreover, there can be disagreement about the content of natural law because not everybody's "reason" is to the same extent rational. The chaos that threatens if an (alleged) conflict with natural law is a sufficient ground not to comply with positive law is against natural law itself because natural law aims at making human society possible.

Law That Is a Little Wrong Considerations like the ones above brought Aquinas to conclude that positive law that is only "a little" wrong should still be obeyed because then the disruption of social order that results from noncompliance is worse than compliance with law that is unreasonable. However, if the violation by positive law of natural law is sufficiently serious, the duty to comply with positive law ends. Obviously, it is far from simple to draw a clear line where the violation of natural law is serious enough to warrant disobedience to positive law.

Radbruch stated it as follows:
"The conflict between justice and the reliability of the law should be solved in favor of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered 'erroneous law'".

14.5.4 Rationalist Law

According to Thomas Aquinas, law consists of rules that tell us what kinds of actions serve the common good. In his view, the question what promotes the common good can be answered by means of reason. Law is therefore a matter of *ratio*, reason. Does this mean that everybody should constantly ask himself what is required by reason in order to find out what the law prescribes? There are several reasons why that is not the case.

14.5.4.1 Prudent Rules

Thinking about what is the wise thing to do takes time, time that is not always available. Therefore, it is sometimes prudent not to think. But that does not mean that one should act thoughtlessly. It is necessary to think about the rules that should be adopted, but as soon as the rules have been adopted it is *in general* prudent to follow the rules without redoing the thinking. This does not exclude the notion that

it is sometimes wise not to comply with the rules. But it does exclude that one always ponders whether to follow the rules or not.

> Imagine that one should at every red traffic light wonder whether it is wise to stop.

Exceptions to rules should only be made in exceptional circumstances, which should be easily recognizable as such.

> An example would be to run a red traffic light to bring a patient whose life is in danger to the hospital.

14.5.4.2 Limited Rationality

Nobody has a perfect mind. Therefore, it is possible that somebody is mistaken even if she is convinced that a particular rule is prudent. Another consequence is that not everybody who thinks about the best possible rules will end up with the same conclusions. And yet it is important that everybody uses the same rules because rules do not only have the function to tell individual persons what to do but also have the function to coordinate the behavior of people who live together.

> Traffic rules nicely illustrate this point. Possibly some rules are better than others. But more important is that everybody uses the same rules, because only then the predictability which is necessary for a smooth traffic comes into being.

Coordination Function The coordination function of rules is also the reason why people should not ignore rules for the simple reason that the rules are not prudent. For a start, they might be mistaken about it. But even if they are right, other people still count on it that they will comply with the existing rules. The coordination function of rules requires that everybody uses the same rules. Therefore, it is in general prudent if everybody sticks to the positive law even if that does not always consist of the best rules.

14.5.4.3 A Fundamental Difference

It may be tempting to oppose natural law theories such as the one proposed by Thomas Aquinas to views according to which law is positive law, the work of human beings. However, we have seen that even from a natural law point of view, it is in general wise to comply with positive law. The practical differences are therefore not so big as might seem at first sight. And yet the fundamental difference is huge. According to Aquinas, law is ultimately not a matter of rules that exist in social practice but a matter of which rules lead to the common good. The reason why we should comply with positive law is not that it is by definition the law but because it is rational to do so.

14.6 Thomas Hobbes: Normative Legal Positivism

According to Thomas Aquinas, positive law constitutes an important part of law, but in last instance natural law determines how we should act. Thomas Hobbes held a fundamentally different view on this issue. With Aquinas, he shared the normative approach to law: law is an answer to the question how we should act. But even though he has the same starting point, Hobbes arrives at an answer that is quite different from that of Aquinas.

Leviathan Thomas Hobbes lived from 1588 until 1679, mostly in England, but also quite some time in Paris. During this period, England was divided by civil wars. Hobbes' most famous book was the *Leviathan*, named after a monster that was mentioned in the Bible. The Leviathan about which Hobbes writes is the state, which is more powerful than individual persons.

In the Leviathan, Hobbes addresses a large number of themes. Here we focus on the way in which Hobbes answers the question after the nature of law. It will turn out that Hobbes, just like Aquinas before him, sees law as a manifestation of reason. Law is in the first place an answer to the question how we should act, and also according to Hobbes this question can be answered by means of reason. However, Hobbes focuses much more than Aquinas did on the certainty offered by law and on the fact that law can be enforced even to the extent that he prefers positive law above rational law if an effective state organization exists.

Pessimism The reason why Hobbes is so strongly attached to the enforceability of law and to legal certainty is that he was rather pessimistic about human nature and its consequences if an effective state authority is lacking. This pessimism might very well be the result of the civil wars that Hobbes experienced.

14.6.1 The State of Nature According to Hobbes

Approximate Equality As starting point for his theory about law's nature, Hobbes sketches a picture of how the world would look like if there were no state. Hobbes calls this situation the *state of nature*. Although, according to Hobbes, people differ from each other, these differences are relatively small. Even the weakest person is capable to kill the strongest in a rash moment. Therefore, in the state of nature, nobody has a claim to something that cannot also be claimed by somebody else. This equality gives everybody an equal hope to realize his desires. And that has the consequence that two people who want the same thing will become each other's enemies if they cannot both have it. To realize their own desires, they will try to destroy or at least to subject each other. (We are talking about the state of nature, without a state.) Everybody knows that everybody else will try to do so, and therefore people will distrust each other.

War of Everybody Against Everybody By way of precaution, people will try to safeguard their positions by means of double-crossing until there is nobody left who might constitute a danger. According to Hobbes, this is allowed in the state of nature because it is necessary for everybody's survival. The result of this all, however, is a war of everybody against everybody else. This war consists not only of actual fights but in particular also of the preparation for possible fights, a kind of cold war. While such a war continues, there are no good opportunities to develop agriculture, industry, or trade. Combined with the continuous fear for actual fights, this makes life disagreeable. In the famous words of Hobbes: "(. . .) the life of man [is] solitary, poore, nasty, brutish, and short."

14.6.2 The Laws of Nature

The state of nature is disagreeable, but his feelings and his reason make it possible for a human being to escape from it. Fear of death, the desire for a pleasant life, and the hope to achieve such a life through his diligence make that man inclined to strive for peace. His reason tells him under which conditions peace can be achieved. Hobbes calls these conditions the *laws of nature*.

The First Law of Nature The first and fundamental law of nature that Hobbes mentions is that everybody should strive for peace as long as he has hope to achieve it but that he should fall back on all the advantages of the state of nature if peace turns out to be unattainable.

The Second Law of Nature From this first law follows a second. Everybody should be prepared to give up all his rights and to be content with as many rights against others as he allows others to have against him, to the extent that this is required for peace and self-conservation, on the condition that the other persons are prepared to do the same.

14.6.3 The State

14.6.3.1 Contracts

Uncertain Performance A renunciation of rights as recommended by the second law of nature is a kind of contract. In the state of nature, contracts are problematic, however. In many contracts, parties promise to do something in the future. One of the parties must perform as the first one and then has to wait for the other party to perform. Performance is very uncertain, however, because in the state of nature there is nobody to enforce the contract. In the state of nature, everybody is entitled to do anything, including nonperformance of made agreements. Therefore, it is very

risky to perform as the first party, and no contract party is therefore obligated to do so. But then it makes little sense to engage in contracts. Hobbes conclusion is therefore that in the state of nature all contracts are void.

Government as Guarantee This becomes different if there is a government that has the power to enforce performance. Then the party who performed first can count on it that the other party will also perform. On the basis of that certainty, there can be an obligation to perform. The same obligation then rests on the other party, and this makes that in civil society (if there is a government) contracts are binding.

This example about contracts illustrates why enforceability is, according to Hobbes, essential for law. Law can only bind people if it is prudent to comply. Because people are approximately equally strong, it is not prudent to comply with rules in the state of nature because there is no good reason to assume that others will do the same. The most important function of the state is to make it prudent to comply with the rules. If everybody complies, out of fear for government enforcement or for other reasons, then everybody is better off than if nobody complies with the rules. It is in everybody's interest if everybody is forced to obey the law.

14.6.3.2 Law and State

According to Hobbes, there can only be law within the context of a state. The reason is that law imposes duties and obligations and that duties and obligations can only exist if it is prudent for people to comply with them. Given the equality of human beings, under which people cannot force each other, a superhuman entity is necessary that can force people to obey the law. This entity is the state.

Following up on this, Hobbes defines law as what the state has ordered its subjects. The government is the legislator but is itself not bound by law. Indeed, it can revoke the laws if it desires to do so.

The laws of nature that hold in the state of nature merely indicate what is required for a safe and pleasant life. They do not obligate. However, as soon as there is a state that enforces the law, the laws of nature become binding too.

14.6.3.3 Positive Law and Natural Law

It is remarkable that in Hobbes' view natural law plays a much more limited role than in Aquinas' view. According to Aquinas, natural law and positive law constitute a coherent whole that must guide man to his natural destination. Both kinds of law have a single purpose in common, and the major difference between the two kinds is the source from which they originate. Natural law is embodied in creation and amenable to being known through reason, while positive law is man-made.

Limited Role Natural Law According to Hobbes, natural law in the shape of the laws of nature almost only plays a role in the state of nature. Moreover, it does not indicate how man can achieve his natural destination but only how it is possible to escape from the misery of the state of nature. As soon as a state exists, the state determines the law. More specifically, natural law does not play a role in

combination with positive law. Natural law is the foundation for positive law because it recommends to form a state and to obey positive law as soon as there is a state. However, as soon as an effective state exists, the only law is positive law, which is created and enforced by the state.

This difference between Thomas Aquinas and Thomas Hobbes can be explained from a different view of mankind. Aquinas assumes that something like human nature exists and that it is possible to establish on its basis what is good for mankind. That is then the foundation for natural law. According to Hobbes, the only thing that humans have in common is that they pursue their own interests, but this interest is different for everybody. A natural foundation for legal rules is lacking; such a foundation must be created. And it is the task of the state to create this foundation—and to enforce it—in the shape of positive law.

14.6.4 Review of Rules Against Legal Principles

Let us have another look at the case Riggs versus Palmer. The New York Court of Appeals decided this case by reviewing the statutory rule about inheritance and last wills against the legal principle that nobody should profit from his own wrongs. The difference between the views of Thomas Aquinas and Thomas Hobbes is well illustrated by this example. The principle against which the judges reviewed the statutory rule was unwritten; it only held because it is reasonable. Although Aquinas would plead for caution with reviewing positive law (legislation) against what is reasonable, reason would in his view be the ultimate standard for what is law. Arguably, therefore, the decision by the New York Court of Appeals to deny Elmer his inheritance would be supported by Aquinas.

Hobbes would probably not have supported that decision. If written rules can be reviewed against what is considered to be reasonable, this opens the way to cast doubt on all law. The result is uncertainty and possibly endless litigation about cases in which parties disagree on what is reasonable. It is the function of positive law to end uncertainty, and therefore reviewing statutory law against unwritten principles is undesirable.

Conclusion

In this chapter, we focused on one central question of legal philosophy, the question after law's nature. We have seen that this question can be asked with different intentions in mind. It may be a normative question, aimed at guidelines for behavior. It may also be a purely conceptual question: what is the nature of this social phenomenon that we call "law"?

Hart answered the conceptual question, and his answer was that law consists completely of positive law, made by rule makers (including judges), who derive their power to create law from positive law. Whether a rule is a legal rule depends only on whether this rule was made by a competent law creator;

the content of the rule does not play any role here. In this way, Hart emphasized the legal positivist view that there are no moral requirements for the validity of legal rules.

In his early work, Dworkin also answered the conceptual question. But he pointed out that judges do use substantive arguments in taking their decisions. Moreover, they do so to determine the content of the law and not merely when they have run out of rules and are in the need to create new law. Apparently, the content of the rules does play a role in determining what the law is. So Dworkin arrived at a nonpositivist view of law on the basis of the conceptual question after law's nature.

Both Thomas Aquinas and Thomas Hobbes answered the normative question after law's nature. They both assumed that natural law determines what is good for mankind. However, Hobbes did not see much that humans have in common, and the role of natural law was therefore confined to prescribing that there should be a state. The "real" law would then be the rules that are created and enforced by the state. So Hobbes arrived at a legal positivist conclusion on the basis of the normative question after law's nature.

Thomas Aquinas assumed that human nature could constitute the foundation for substantive natural law. There is a need for positive law, but positive law should always function within the framework of natural law. So Aquinas arrived at a nonpositivist view of law on the basis of the normative question after law's nature.

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